

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

C.V. 2013-01438

BETWEEN

ALDWYN SAUNDERS

CLAIMANT

AND

JIM MCPHIE

DEFENDANT

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES

Mr. Mark Seepersad for the Claimant

Ms. Ngozi Ihezue for the Defendant

ORAL JUDGEMENT

BACKGROUND

1. The claimant lives at 796 St. Mary's Village Road, Moruga. The defendant, his brother in law, lives in adjoining property to the north.
2. The claimant claims that the defendant removed support from his property in May **2009** by excavating and removing the soil along the boundary to flatten his own land, creating a sheer face,- ('a straight drop') -with a difference in height, between the claimant's and defendant's property.

3. He claims in effect that the difference in height, which replaced the pre-existing stable slope between the properties, has caused the soil on his property to subside, to re-establish equilibrium at a stable gradient. That subsidence has led to significant cracks developing in and around his house, which, although he is forced to continue to live in it, has become unsafe for habitation.

4. The defendant claims that he did not bring “heavy machinery” onto his property, and denies that any cracks on the claimant’s property were the result of any activity by him. In fact he admits to carrying out some works on his property, (though in May **2007**), namely by the use of a back hoe to “grade a drive way and take out” a garbage dump on his property.

5. He denies, (although no one contends that he did), that he used an excavator. He admitted erecting a wall. The claimant contends that that wall collapsed, that its foundations were too shallow, and built without observable steel. He alleges that the defendant did nothing after that wall collapsed to support the soil at the face of the excavation, so as to prevent slippage and subsidence of unsupported soil on the claimant’s property.

6. He claims that the cracks on the claimant’s property were pre-existing and of long standing. He suggests, through the case put in cross examination by his attorney at law, that the claimant’s house was an old one built on sloping land, implying that its state of disrepair was normal age related deterioration, aggravated by the fact that it was built on sloping land.

7. However photographs taken by the Claimant’s daughter clearly show the difference in height between the properties created by excavation, and the sheer, unsupported drop created by the excavation on the defendant’s land.

8. It is not in dispute that the defendant did excavation works on his land. It cannot be disputed that there was created, through excavation on the defendant’s land, a difference in the height between the properties at their boundary.

9. The expert evidence of Mr. Sirju, a structural Engineer, was unaffected by cross examination. It was to the effect that:-

a. The soil type in that area is stable at a gradient of one in three. Therefore creation, by excavation at the boundary, of a steeper gradient than one in three between the properties, creating a drop or difference in height, would lead to the soil's subsiding until a stable gradient of at least one in three was re-established.

b. That slippage was the most likely cause of the cracks in the house on which it stood. He ruled out other possibilities, such as earthquake and erosion, as probable causes.

10. The evidence of the claimant and his daughter is that,

i. they only began to observe cracks in the claimant's house after the excavation works carried out by the defendant at his boundary, when the rainy season began, and

ii. that the cracking has been continuing.

In fact Mr Sirju describes the cracking, including that of the floor, as indicative of an **active** soil condition.

ISSUES

11.

a) Whether the defendant carried out excavation works at the boundary between his property and the claimant's property.

b) Whether the actions of the defendant in carrying out those excavation works caused damage to the claimant's property.

c) If so, what was the extent of that damage.

d) What loss, if any, is recoverable by the Claimant.

CONCLUSION

12.

a. The defendant did carry out excavation work at the boundary between his property and the claimant's property.

b. The actions of the defendant in carrying out those works did result in subsidence and consequential cracking of the claimant's property, causing damage to his house, and rendering it unsafe for habitation.

- c. The extent of the damage is as detailed in the report of the expert structural engineer Mr. Sirju.
- d. The cost of remedying the damage is as set out in the largely undisputed estimate of Mr. Heeralal. A deduction there from of \$21,000.00 must be made, as it includes estimates for the reconstruction of a portion of retaining wall already built by the Claimant at a cost of \$21,000.00 on the basis that he cannot be sure if its construction was fit for purpose. However the claimant has described its method of construction, as well as the fact that it has been effective in slowing soil movement. Therefore the need for replacement of that wall has not been established.
- e. The claimant is also entitled to be compensated for the physical inconvenience, stress, and anxiety, in being constrained to reside in a structure that is subject to cracking and compromised structural integrity.

DISPOSITION AND ORDERS

13.

- i. The defendant is to pay to the claimant the sum of \$247,810.00 as damages for nuisance and negligence being the cost of reinstating his property to habitable condition.
- ii. The defendant is to pay to the claimant the further sum of \$57,800.00 being compensation at the rate of \$750.00 per month from June 1st 2009 to January 20th 2015 (\$9,000.00 per year) for the continuing unabated physical inconvenience, and mental distress and anxiety as a result of having to live in an unsafe house under the conditions negligently created by the Defendant.
- iii. The defendant is to pay to the claimant the sum of \$21,000.00 as special damages, with interest thereon at the rate of 3% per annum from December 31st 2009.
- iv. The defendant is to pay costs to the claimant on the basis prescribed by the Civil Proceedings Rules for a claim in the total amount of i, ii, and iii above.

- v. The defendant is to reimburse to the claimant the costs of the expert Mr. Sirju in the sum expended of \$7,300.00.

REASONS FOR DECISION

ANALYSIS AND REASONING

14. The Defendant admitted that some work was carried out, but denied the extent of the work was as claimed by the Claimant. The Defendant pleaded that he graded the land down to 3 feet only.

15. In the light of the continuing and extreme structural damage, and the photographs supporting the Claimant's contention that a sheer face was created by the defendant's excavation, the fact is that that excavation, whether 3 or 4 feet as stated by the defendant, or 4-12 feet as claimed by the Claimant, left the Claimant's land without support.

16. The Defendant denied that the Claimant ever brought to his attention his concerns regarding the work carried out, or any damage to his land and house. In light of the fact that the defendant was the brother of the Claimant's wife, this is also highly unlikely. It is far more likely that, as the Claimant claims, his wife attempted to speak with the Defendant, and he was not helpful.

17. The Claimant relied on causes of action based on negligence, as well as nuisance, in the carrying out of the excavation and earth works, and in failing to take sufficient remedial steps thereafter.

18. It was not seriously disputed:-

- a. that the defendant had a duty to his neighbour, the claimant, to refrain from committing a nuisance by activities on his own land, which affected the use, enjoyment, and value of the claimant's property;
- b. that if the defendant had, as a question of fact, actually carried out excavation works at the boundary, which caused the damage complained of, then he would have acted in breach of that duty.

- c. there also exists a duty of care on the part of the Defendant not to negligently remove soil support for adjoining land, if damage to the adjoining land is reasonably foreseeable as a result.

19. At issue is the breach of those duties - whether the excavation works of the Defendant were carried out in a negligent manner, and whether breach of that duty caused the **damage** of which complaint is made. It is not contended that such damage was not reasonably foreseeable. If it had been so contended, the photographs taken by the Claimant's daughter, and the evidence of Mr. Sirju, would demonstrate conclusively that damage as a result of the excavation of the type depicted thereon, leaving the face at the boundary unsupported, would be reasonably foreseeable.

EVIDENCE

Aldwyn Saunders

20.

- 1) The Claimant had been living on his parcel of land for 42 years and living in his house thereon since 1988 without damage to the premises.
- 2) The Defendant lived to the north of the Claimant's property.
- 3) He testified as to the excavation and earth works conducted by the Defendant between the 9th and 15th May, 2009. He stated that the excavation and removal of soil was about 2 feet away from the boundary. The grading left a straight drop between the two properties. That drop was shown in the pictures annexed to his witness statement, which had been taken by his daughter.

21. Following rains in the month of May 2009, after about a week he noticed cracks and slippage of dirt at the boundary. Then he began noticing cracks appearing in his house – the walls, floor and concrete walkway.

22. The Defendant attempted to construct a wall on the boundary between the Claimant's and Defendant's parcel. That wall collapsed. The claimant alleges that its foundation was too shallow and there was no steel in it.

23. The Defendant left the land. The Defendant was took no action in response to complaints made to him.

24. The damage to the Claimant's house continued. The Claimant was constrained to mitigate that damage by commencing work on a retaining wall at his own expense. That wall was not completed as the Claimant has testified that he did not have enough money to finish the construction. He expended \$21,000.00 on its construction.

25. The Claimant had the property inspected by Mr. Kenneth Sirju – civil and structural engineer. He presented estimates of the cost of remedying the defects to the house and arresting any further damage by the construction of a complete retaining wall.

26. He stated that he was fearful for the safety of his family, but had no choice but to continue to live in the house in its damaged condition.

27. His evidence was unaffected by cross examination. It was put to him that his house was old and had pre-existing cracks unrelated to any work done by the defendant. This was comprehensively rejected, both by his daughter, (whose evidence was forthright, straightforward, and based on common sense), and Mr Sirju, whose expert evidence linked the **active** soil condition to the excavation work on the adjoining property.

28. The photographs also clearly revealed the state that his property was left in with the removal of soil support at its boundary with the Defendant's land.

29. It would have been obvious to any reasonable person that excavation to that extent would have left the claimant's land without support at the boundary, and, if not braced, or supported by a retaining wall constructed at the face of that excavation, that slippage of his adjacent land, and house thereon, would be a real possibility.

30. This was confirmed by the expert testimony of Mr. Sirju, whose qualifications and experience were beyond challenge, and whose evidence is accepted in its entirety.

Mr. Kenneth Sirju

31.

In the case of unbraced excavations, cut faces become unstable and as a result of gravitational forces, displacement occurs. The active wedge of soil extends laterally to a distance required for a new stable angle. In clayey soils a 3:1 ratio is the typical limit for stability.

Excavations result in a change in slope equilibrium and as a result, soil creep or slope failure occurs. A retaining wall is required to arrest lateral movement. In its absence, an active wedge of soil is created and instability in foundation elements which rely on an unchanging subgrade, can result.

The damage is significant and was stated to occur shortly after excavation works. In the absence of a significant earthquake or other hazard, the excavation is a plausible cause.

The excavations should have been temporarily braced and a retaining wall constructed in the shortest possible time, to maintain the original slope stability.

32. He corroborated by independent expert testimony:-

- a. the fact that work was carried out on the Defendant's land,
- b. the extent of the work conducted,
- c. the likelihood that that work caused the damage to the Claimant's property, and
- d. the extent of that damage.

Herralal Bridgelal

33. The witness gave evidence that he was a builder and had been working in the construction sector since he was 13 years old. He gave particulars of the work necessary, the manner in which the remedial construction works would have to be completed, and the cost of

the remedial work (labour and materials). His evidence related to the extent of the construction works necessary to repair the Claimant's premises.

34. It was accepted that his evidence in the witness box might have appeared less than compelling. However, the substance of his evidence was credible and logical. The witness indicated that at times he had difficulty hearing, and the court was reminded of the fact that he had been recently very ill in hospital. His witness statement, which comprised his evidence in chief, provided a logical methodology for restoring the claimant's house to habitable condition.

35. It is clear that there will be an element of enhancement of the Claimant's property if it were to be, in effect, rebuilt in accordance with the estimate of his builder. However, he has adequately explained the reasons for this. He has explained for example:-

- a. why the galvanise needs to be replaced if the roof is removed,
 - b. why electrical work has to be done anew if cracked and irreparable block walls need to be demolished,
 - c. how the foundation will be strengthened and stabilised,
- all in a logical manner.

36. Allowance is therefore made for his recent illness, and difficulty in hearing, especially when he was not challenged by the defendant's attorney on the works that he claimed were necessary, or the cost thereof.

37. He explained that a retaining wall needed to be constructed and completed. He did not make allowance for the fact that part of a retaining wall had already been constructed by the claimant as he was unsure as to the construction methods used on it, and whether it would have been fit for purpose.

38. However the claimant has described logical construction practices for construction of that wall, and testified that it had the intended effect of slowing the cracking on his house. There is no reason therefore to permit the cost of reconstructing that portion of the retaining wall, especially when it has not been sufficiently demonstrated that that wall needs to be rebuilt. To the extent

that the claimant claims for both the wall that he constructed **and** a replacement wall over the same area, the cost of one must be disallowed.

39. Mr. Heeralal estimated the cost of work, including the construction of a complete retaining wall at \$268,810.00. Deduction must therefore be made from that figure of the cost of \$21,000.00 of the previously completed portion of the retaining wall.

Prudence MacFarlane

40. This witness gave details of the grading works which she witnessed including the names of persons she knew who were operating the backhoe employed by the Defendant. She stated that the effect of the grading was to grade out the slope of the Defendant's land, leaving a drop of between 4 to 12 feet in places. She stated that the land was not braced to prevent movement, or graded in a slope. It was dug "straight down".

41. She stated that she lived in the middle room of the Claimant's house at the time and that until shortly after the grading works there were never any cracks in the Claimant's house. She first noticed the cracking about 2 weeks later after rainfall.

42. She gave evidence that after the cracks had appeared in the house the Defendant came to the lands and began constructing a wall on the northern boundary. This wall collapsed shortly after being erected. The Defendant left the area for a while leaving the graded area in exactly the same condition – *'place remain caving, land moving and house cracking and the defendant was nowhere around'*.

43. This witness gave evidence that the photographs relied upon by the Defendant were recent photographs.

44. The Claimant's case was that the house had been standing undisturbed and undamaged since construction in 1988 until the grading works of the Defendant.

Jim Mcphie

45. He relied on photographs taken recently, which showed the land in its present state rather than the condition it was in after he had done the excavation.

46. To the extent that he attempted to contend

- a. that he observed cracks in the claimant's house which rendered at least one room uninhabitable, or
- b. that the age of the claimant's house, coupled with the fact that it was built on sloping land was the cause of any damage that might be observed, or that
- c. the claimant was seeking to extract compensation from him because of bad relations between them,

his evidence was simply not credible. He did not stand up at all well to testing of such testimony under cross examination. Apart from this, his testimony was directly contradicted by photographs, and competent, and far more credible, expert evidence.

47. There was clearly a breach of duty on the part of the Defendant not to take steps which it was reasonably foreseeable might cause damage to the claimant's property. Removal of support from the claimant's property at the common boundary, and leaving it unsupported, were clearly breaches of such duty. This was clearly reckless. At its lowest it was negligent. It must have been reasonably foreseeable that the failure to support the excavation at its face, and in any event before the rains of the rainy season had begun, would result in slippage of the soil on the claimant's land.

48. It must have been reasonably foreseeable that the failure to construct an effective retaining wall after the excavation was so as to prevent soil movement would result in soil movement in the adjoining land. The claimant's house was sufficiently close to the boundary that it must have been reasonably foreseeable that its foundations would be affected by slippage of soil.

That is the effect of the expert evidence.

DAMAGES

49. The Claimant claims the cost of repairs to his dwelling house. The claimant is entitled to be compensated for damage caused to his property in this way by the actions of the defendant. The measure of such damages is the cost to restore him to the position that he was in before the tortious conduct of the Claimant took place. This would be the cost of restoring support to his property by construction of a retaining wall, and the cost of restoring the structural integrity of his home and making it once again fit for habitation. It has not been contended that the appropriate measure of damages is not the costs of repairing the Claimant's property.

50. In the circumstances, the Claimant has proved his loss in respect of the estimated cost of repairs. He is entitled to recover the sum of \$268,810.00, in respect of the estimated costs of repair less \$21,000.00. He is also entitled to recover the sum of \$2,000.00 actually expended by him in the partial construction of the retaining wall.

DAMAGES FOR MENTAL DISTRESS, SUFFERING AND INCONVENIENCE

51. The Claimant contended that he was also entitled to recover damages for mental distress, suffering and inconvenience. While his pleaded claim was for damages for negligence and nuisance, it was clearly pleaded that he suffered distress, inconvenience, and loss of amenity in living in hazardous conditions with imminent danger caused by the subsidence of the house, with, inter alia cracking of the walls, including load bearing walls.

52. The effect of the authorities can be summarised as follows:-

- a. Damages for physical inconvenience and mental distress have been recognised as a subhead of damages recoverable for some torts including nuisance and negligence.
- b. As aggravated damages are **compensatory**, not punitive, there is a possibility that aggravated damages are equivalent to damages for mental distress and inconvenience.
- c. Damages for nuisance are in relation to damage to land, not damage to the person.

53. Accordingly if the claimant were to recover under this sub head of damages it would probably be under the heading of damages for negligence, not nuisance.

54. It is not necessary to analyse in depth the various conceptual bases for damages for mental distress and suffering consequent upon physical inconvenience, once it is clear, as it appears to be, that the courts have recognised that damages in tort are recoverable for:-

- a. physical inconvenience, and
- b. mental distress consequent upon such physical inconvenience.

55. Whether they are properly to be equated with aggravated damages is primarily a matter of nomenclature, once the principle is accepted that in any event damages described as either, must be compensatory. Examples of these are given in the texts as set out in the addendum hereunder, (all emphasis added).

56. In *Bankay and Ors v Harrilal and Ors HCS 100/1999* the Honourable Justice Stollmeyer recognised the possibility of awarding damages for mental distress consequent upon physical inconvenience in a case which similarly dealt with removal of support of land, and consequent property damage.

57. The Claimant pleaded that the he continued to live under the fear of further damage to his house and the possibility of personal injury to himself and his visitors. Mr. Sirju's evidence was that the Claimant's house was not fit for habitation. The Claimant's evidence was that he had no alternative accommodation and had sustained the loss of a leg which affected his earning ability and his ability to take his own remedial actions or relocate. In any event he had begun construction of a retaining wall but was forced to stop as a result of financial constraint. The defendant had attempted to construct a wall on the boundary but it collapsed.

58. No further work was done to support the land at that boundary .The claimant's property was left exposed to the possibility of continued slippage as the soil subsided on its way to re-establishing equilibrium at a less steep, and more stable slope, closer to one in three.

59. The claimant has had to live in his property since 2009 with continuing cracks, which his expert witness has testified, in effect, have compromised the structural integrity of the entire

building. The claimant built his house more than 40 years ago. It was not subject to cracking until the works by the defendant. Thereafter cracks appeared, and new cracks continue to appear.

60. The defendant left the claimant to his own devices. He took no effective steps to alleviate the unstable slope that he created through his excavation. He put at risk the structural integrity of the claimant's house and property, and jeopardized the safety of the claimant, other occupants of the house, and his visitors.

61. The claimant is entitled to be compensated for the distress and inconvenience of having to live under such stressful conditions since 2009.

62. This was assessed on a date fixed to allow the attorney at law for the defendant the opportunity to attend and make representations. No one attended on behalf of the defendant.

63. Because there will be an element of enhancement of the Claimant's property if it were to be, in effect, rebuilt in accordance with the estimate of his builder, I decline to make any further award of interest, save in respect of the sums actually expended by the Claimant.

DISPOSITION AND ORDERS

64.

- i. The defendant is to pay to the claimant the sum of \$247,810.00 as damages for nuisance and negligence, being the cost of reinstating his property to habitable condition.
- ii. The defendant is to pay to the claimant the further sum of \$57,800.00 being compensation at the rate of \$750.00 per month from June 1st 2009 to January 20th 2015 (\$9,000.00 per year) for the continuing unabated physical inconvenience, and mental distress and anxiety as a result of having to live in an unsafe house under the conditions negligently created by the Defendant.
- iii. The defendant is to pay to the claimant the sum of \$21,000.00 as special damages, with interest thereon at the rate of 3% per annum from December 31st 2009.

- iv. The defendant is to pay costs to the claimant on the basis prescribed by the Civil Proceedings Rules for a claim in the total amount of i, ii, and iii above.
- v. The defendant is to reimburse to the claimant the costs of the expert Mr. Sirju in the sum expended of \$7300.00.

Dated the 11th day of February, 2015

Peter A. Rajkumar
Judge

Addendum

Clerk and Lindsell on Torts 20th edition

28-138

*Aggravated damages are thus, at least in theory, quite distinct from exemplary or punitive damages which are awarded to teach the defendant that “tort does not pay” and to deter him and others from similar conduct in the future. Nevertheless, the two kinds of damages are not always easy to keep apart from one another in practice, and in many older cases large awards have been given without its being made clear whether this was done on the compensatory or punitive principle. Now, however, that it has been made clear that exemplary damages may be awarded only in certain classes of case the maintenance of the distinction is important. Despite Lord Devlin’s opinion that, in general aggravated damages can do most if not all the work that could be done by exemplary damages, it has to be borne in mind that, except where exemplary damages are permissible, **every award of damages, including aggravated damages where appropriate, must be justifiable on the basis of compensation.** If it is not, the inference will be that an improper element of punishment of the defendant or of simple bounty for the claimant has entered into the assessment and the award will, accordingly, be struck down on appeal. It is submitted that **the law would be improved in terms of clarity if aggravated damages were regarded as nothing more than “mental distress damages” or “damages for injured feelings”** and if the very term “aggravated damages” was replaced by either of those phrases. Certainly the relationship between aggravated damages and damages that are awarded for injured feelings irrespective of aggravated conduct is not straightforward. In *Rowlands v Chief Constable of Merseyside Police* it was laid down that, as aggravated damages are compensatory and not punitive, a judge and/or jury must be careful to ensure that there is **no double recovery** between “basic” and “aggravated” damages for assault, false imprisonment and malicious prosecution by the police. So in principle **where damages for distress, humiliation and injury to feelings have been fully compensated as part of the “basic” damages, they should not be the subject of further compensation in the form of an award of aggravated damages.***

*Looking first at **physical inconvenience**, it appears that, as in contract so in tort, damages for physical inconvenience have long been recoverable and are not subject to special restrictions. Moreover, in contrast to the position taken until recently in contract, it would seem that in tort cases damages for mental distress consequent on physical inconvenience have not been separated out as irrecoverable.*

*So, while usually not classified under the head of **physical inconvenience**, damages for the tort of false imprisonment must always include some compensation for the claimant's physical inconvenience. The same must generally be true for nuisance. In *Bone v Seale*¹, for example, two owners of neighbouring property were awarded damages for the "inconvenience, discomfort and annoyance"² caused by the smells from the defendant's pig farm which constituted a **nuisance**; and in *Hunter v Canary Wharf Ltd*³ Lord Goff said, "If a nuisance should occur then the spouse who has an interest in the property can...recover any damages in respect of the discomfort or inconvenience caused by the nuisance". In *Mafo v Adams*⁴, damages for physical inconvenience were expressly awarded to a tenant in an action for deceit against his landlord, who had induced him to leave protected premises, and in *Millington v Duffy*⁵ a tenant was awarded damages for inconvenience and distress primarily for trespass to land, his landlord having wrongfully evicted him. In *Saunders v Edwards*⁶ damages for inconvenience and disappointment were awarded to the tenants of a flat who had been induced to buy the lease by the defendant vendor's fraudulent misrepresentation that it included the roof terrace. And in *Perry Sidney Phillips & Son*⁷ and *Watts v Morrow*⁸ damages for the **physical inconvenience** (and consequent distress) of living in a house with defects (or while repairs were being made to remedy those defects) that had been negligently omitted from the defendant surveyor's report were awarded in an action brought for **both the tort of negligence and breach of contract**. Finally in *Ward v Cannock Chase District**

¹ [1975] 1 WLR 797

² [1975] 1 WLR 797 at 804

³ [1997] AC 655, 694

⁴ [1970] 1 QB 548

⁵ (1984) 17 HLR 232

⁶ [1987] 1 WLR 1116

⁷ [1982] 1 WLR 1297

⁸ [1991] 1 WLR 1421

Council ⁹ damages were awarded for the **discomfort** and consequent **distress** of living initially in a house with a hole in the roof and later in overcrowded temporary accommodation, all of which was caused by the defendants' tortious **negligence** in leaving neighbouring houses derelict. Turning to mental distress, that is not consequent on physical inconvenience, the law has traditionally been more favourable to the distressed claimant in tort than in contract. So there has been compensation, often under the head of "**aggravated damages**", for mental distress caused by torts such as false imprisonment, malicious prosecution, assault and battery, defamation, **nuisance**, trespass to land, deceit, and even trespass to goods.

McGregor on Damages 19th Edition, Pages 1345-1349

37-019

Beyond **physical and other damage to the land** leading to pecuniary loss, **a nuisance may cause annoyance, inconvenience, discomfort, or even illness to the claimant occupier. Recovery in respect of these principally non-pecuniary losses is allowable** and may be regarded as part of the normal measure of damages. In the cases the claimant has been disturbed in the occupation of his home. Early illustrations are afforded by *Halsey v Esso Petroleum Co* where the claimant suffered noise and smell from an oil distributing depot, *Bone v Seale* [1975] 1 WLR 797 CA where the claimant had to endure persistent smells emanating from a pig farm, and *Bunclark v Hertfordshire C.C.* where the spreading of tree roots inflicted upon the claimant **cracked walls, dust and general anxiety**. *Bone v Seale* was taken to appeal, and the Court of Appeal reduced the award for 12 years of discomfort from £6000 to £1000, *Stephenson and Scarman L.JJ* considering that the award below must be too high in the light of awards for loss of the sense of smell in personal injury cases. In *Ward v Cannock Chase District Council* [1986] Ch 546, a case of negligence rather than nuisance, the court held the claimant **entitled to damages for discomfort, and any attendant anxiety and distress**, experienced by himself and his large family, first in living in a house which the defendant council had failed to repair and later in living in

⁹ [1986] Ch 546

temporary, and unsatisfactory, accommodation while the house was being rebuilt. The Court of Appeal's award in *Scutt* was of £3000 but in *Bryant* the trial judge's award was increased by the Court of Appeal to £12000 as the loss of the amenity of the trees affected the enjoyment of the claimant's home very directly and more severely than in the earlier case. In *Alcoa Minerals of Jamaica Plc v Broderick* [2002] 1 A.C. 371 PC where the defendant's smelting plant affected the claimant's nearby house, the general damages of Jamaican \$30,000 awarded below went unchallenged in the appeal to the Privy Council and, although looking very large, was the equivalent at the time of the award of under £600. In *Barr v Biffa Waste Services Ltd* [2011] 4 All E.R. 1065 damages were claimed in nuisance by over 150 households on account of the smell from pretreated waste coming from the defendant's landfill site. While the claims all failed as the defendant's user was held to be reasonable and therefore not a nuisance and, this apart, while practically all of the household claims would have failed as the smell was not shown to have exceeded a permissible threshold, any household which could prove that for it the threshold had been exceeded would have been held entitled to 1000 per annum for loss of enjoyment of property, there being no diminution in value of any of the properties. Similarly, in *Anslow v Norton Aluminum Ltd* [2012] EWHC 2610 QB 132 households largely succeeded in claiming nuisance damages on account of odours emanating from an aluminium foundry operated by the defendant but did not succeed on account of dust, smoke and noise as there had been an insufficiency of interference. Awards were to be of modest amounts ranging from 750 to 2000 per annum. All these amounts of course need to be updated to current prices in order to appreciate the level of awards; in particular, the ruling in the ultimate Court of Appeal hearing of *Simmons v Castle* that damages for all types of non-pecuniary loss in all civil claims should be increased by 10 per cent needs to be kept in mind.

37-020

Particularly in relation to the recovery of damages for non-pecuniary loss in nuisance, *Dobson v Thames Water Utilities Ltd* is an important case, both in the hearing in the Court of Appeal and in the following assessment of damages before Ramsay J. Occupiers of properties in the vicinity of the defendant's sewage treatment works were adversely affected by odours and mosquitoes from the defendant public authority's negligent operation of those works. A class action was brought by the occupiers claiming common law **damages for nuisance** and damages for breach

*of the Human Rights Act, only the occupiers with a proprietary interest being entitled to claim in nuisance. At Court of Appeal level, while assessing the nuisance damages was not in issue, the court nevertheless emphasized that it was **damage to the land** and **not damage to the person** that was **the essence of recovery in nuisance**. Interference with the claimant's enjoyment of his property is the gist of the claim here; it is the **proprietary loss of amenity** not the personal loss of amenity, as in personal injury claims, for which the damages are awarded.*