THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 72 of 2015
Claim No. CV2011-04931

BETWEEN

NATIONAL AGRICULTURAL MARKETING AND DEVELOPMENT CORPORATION

Appellant

AND

DAVINDRA MAHARAJ

Respondent

PANEL:

A. MENDONCA, JA

P. JAMADAR, JA

P. MOOSAI, JA

DATE DELIVERED: 22 May 2019.

APPEARANCES:

Mr. R. Martineau SC and Mr. F. Hosein for the Appellant.

Mr. L. Sanguinette and Mr. A. Mohammed instructed by Mr. R. Ramoutar for the Respondent.

I have read the judgment of Moosai JA and agree with it.

A. Mendonca

Justice of Appeal

I too, agree.

P. Jamadar

Justice of Appeal

JUDGMENT

Delivered by P. Moosai JA

I. Background

[1] This appeal concerns public nuisance. The National Agricultural Marketing and Development Corporation ("NAMDEVCO") appeals against the trial judge's decision of 10 March 2015 in which the learned trial judge held NAMDEVCO to be liable for the tort of public nuisance. She construed the provisions of the National Agricultural Marketing and Development Corporation Act Chap 63:05 and Regulations ("the Act" and "the

Regulations" respectively) as having imposed upon NAMDEVCO a statutory duty to remove nuisances and obstructions in the Norris Deonarine Northern Wholesale Market ("the Market"), or in the immediate environs thereof. She ordered NAMDEVCO to pay the appellant damages for nuisance in the sum of $65,000.00 and granted an injunction against it restraining further nuisance.

II. The Relevant Background Facts

[2] NAMDEVCO has been operating the Market since 1 April 2002.

[3] The Market is situated at the corner of the Churchill Roosevelt Highway and the Macoya Road Extension. The latter road is not a thoroughfare. Nonetheless, it provides access to a residential community, the entrance to which is marked by a line of houses on its western side, either opposite or obliquely opposite the Market.

[4] This claim was originally brought and filed on 19 December 2011 by a total of twelve named claimants, collectively referred to as the Occupiers and Residents of Macoya Road Extension, Macoya, against NAMDEVCO, the statutory body corporate responsible for the operation of the Market located. In summary, they contended that the Market's operations generally, as well as its negligence in conducting its operations, caused substantial interference with access to their homes.

[5] The Market originally opened from Monday to Friday. Over time, the opening and closing hours have changed considerably. The affidavits of some of the claimants, including, in particular, an affidavit of Mr Davindra Maharaj ("Mr Maharaj"), who lives opposite the Market, filed 19 December 2011, alleged that in or around 2010 the Market opened at 2:00am. These deponents say that, around this time, it was almost impossible to drive into their homes between the hours of 8:00pm and 3:00am. This was as a result of goods vehicles carrying farmers' produce completely blocking the Macoya Road Extension and carrying on market sales.

[6] In or around January 2011, the deponents alleged that NAMDEVCO changed the opening hours of the gates to 5:00pm. However, this only resulted in farmers/vendors assembling on the roadway from about 11 am and carrying on market trade while awaiting entry.

[7] In an effort to alleviate the situation, all concerned stakeholders were invited to a meeting at NAMDEVCO's compound on 25 June 2011. Among the matters discussed were traffic congestion and vendors urinating on residents' walls. It appears that from the complaints of the residents, NAMDEVCO obtained the assistance of:

(a) The Municipal Police of the Tunapuna Regional Corporation ("the TPRC") in the placement of thirteen "No Vending" signs along the Macoya Road Extension; and

(b) Officers of the Tunapuna Police Station in the placement of seven temporary "No Parking" signs along this road.

Notwithstanding this intervention, the claimants contended that throughout 2011, until the commencement of these proceedings, the situation complained of continued unabated. In support thereof, Mr Maharaj annexed several photographs taken one week before the hearing of the application for interim relief.

[8] These claimants on 19 December 2011 applied for interim relief seeking, *inter alia*, an injunction restraining NAMDEVCO and/or its agents and/or its customers from:

i. Blocking or otherwise obstructing the roadway, both the Churchill Roosevelt Highway and the Macoya Road Extension, Macoya with vehicles; and

ii. Buying and selling or conducting marketing activities on the roadway both of the Churchill Roosevelt Highway and the Macoya Road Extension, Macoya.

The application also sought an Order from the court that NAMDEVCO cease all market activities at the Macoya Road Extenstion, as well as damages for the nuisance, distress and inconvenience caused.

[9] In attendance at the hearing of that application was a representative from the TPRC which had proclaimed an interest in the outcome of this matter. The TPRC eventually agreed to be joined in the matter solely to facilitate an interim arrangement which the parties were able to arrive at by consent. This undertaking by consent provided that:

i. NAMDEVCO and the TPRC shall endeavour to procure the placement of "No Parking/No Waiting" signs on the Macoya Extension Road, in the vicinity of the

entrance to the Macoya wholesale market between the hours of 10:00am and 7:00pm each day commencing 21 December 2011 and continuing until the adjourned date of Mr Maharaj's application.

ii. The TPRC shall endeavour to provide a minimum of two uniformed police officers from the Trinidad and Tobago Police Service ("TTPS") between the hours of 11:00am to 6:00pm on all days that the said Market opens.

[10] Following the implementation of these measures, as conceded by all parties involved, the situation significantly improved, bringing immediate relief.[1] Over the next two years, the matter was called from time to time before the court to allow the court to be updated as to the status of the arrangement, with the parties being encouraged to negotiate with a view to avoiding a trial. Despite a general improvement in the situation and the recognised efforts of all the parties (as noted by the trial judge in her judgment) the matter nonetheless proceeded to trial.

[11] Before the hearing on 3 November 2014 NAMDEVCO successfully applied to have eleven of these twelve claimants struck out for non-compliance following their failure to file witness statements. This left Mr Maharaj as the sole claimant. Even so, the particulars of the claim as originally filed were maintained and it was his case that the Market's operations were being conducted in such a way that substantial interference was being caused to him in terms of his ability to access his home during market hours, along with other kinds of discomfort, such as congestion and traffic gridlocks. The claimant maintained that there continued to exist an unsatisfactory state of affairs that could only be rectified via the granting of the relief claimed.

III. The Trial Judge's Findings

[12] At the trial of this matter, questions were raised as to whether Mr Maharaj had the requisite standing to bring this claim in nuisance as he had failed to adduce evidence of title specific to the house which he occupied. The judge determined that the claimant did

[1] *CV2011-04931 Davindra Maharaj v NAMDEVCO* [6], [13] & [14].

satisfactorily establish that he was the owner of the house abutting the Macoya Road Extension and that he did suffer inconvenience and interference occasioned by the defendant's market operations beyond that which ordinary road users would suffer generally. The damage sustained was not 'fleeting or evanescent', even though it was only suffered on market days. She accepted the claimant's evidence of congestion, serious obstruction to the road, and interference with access to his premises and to the Macoya Road Extension and the highway and concluded that by any standard, the inconvenience regularly suffered reduced the level of comfort and enjoyment below that to which he was entitled. She attached, as she was entitled to, considerable weight to the photographs taken by Mr Maharaj in December 2011, depicting what he asserted was the general state of affairs of the Macoya Road Extension on market days. The judge properly described these photographs as revealing:[2]

> …scenes of utter congestion and chaos on part of Macoya Extension Road in the area of the market. The claimants alleged it was caused by indiscriminate parking, uncontrolled market traffic which built up even from the point of the entrance of the highway; offloading and transferring of goods by barrow men from one vehicle to the next; as well as vending on the roadway itself by vendors who engaged in trade while they await the opening of the market gates.

[13] The judge rejected NAMDEVCO's assertion that in acting in pursuance of its mandate under the Act it was made immune from suit. She was of the view that the Act's supplementary regulations, regulation 3 (1) (h) specifically, charged the defendant with responsibility for the removal of nuisances or obstructions in the Market or in the immediate environs thereof. This imposed on NAMDEVCO a statutory duty to prevent uncontrolled traffic, the parking and blocking of driveways, illegal vending, and the loading and offloading of goods on the Macoya Road Extension which fell within the environs of the Market (that the Macoya Road Extension fell within the environs of the Market was accepted by the defendant's main witness Mr Narinesingh in cross-examination). She concluded that these were the very activities that the Regulations

[2] *Ibid* [4].

were intended to protect against and rejected NAMDEVCO's position that it was only responsible for what took place within the walls of the Market compound.

[14] Having found that the Act and Regulations imposed upon NAMDEVCO a statutory duty to prevent obstructions and nuisances in and around the Market and its environs, the judge did not deem it necessary to deal with the case in negligence. NAMDEVCO's liability under the regulations was strict and it could not argue that the nuisance established occurred despite it having taken all reasonable steps to avoid same. The effect of regulation 3 (1) (h) was to impose liability on NAMDEVCO even in the absence of negligence on its part.

[15] The trial judge also rejected the defendant's invitation to conclude that the decision of the eleven other claimants to no longer pursue their claim was indicative of there no longer being a need to pursue the matter further as the measures put in place had alleviated substantially any interference initially complained of. She was of the view that Mr Maharaj was entitled to bring his claim individually and to attach any significance to the striking out of the eleven other claimants, in the absence of any clear reason put forward for their decision to no longer pursue their claims, was to invite speculation. That they dropped out did not ultimately affect the credibility of Mr Maharaj's claim.

[16] The judge in her written judgment recognised that the real question to be answered, having accepted that NAMDEVCO's operations caused substantial interference to the Macoya Road Extension and with the claimant's right of access and egress from his home, was whether or not a permanent injunction ought to be granted restraining market operations. Relevant to this determination in the judge's view was the issue of Town and Country approvals. The evidence established that although NAMDEVCO had obtained the necessary approvals to construct the Market, these were but conditional approvals. NAMDEVCO had proceeded to construct and operate the Market without developing the ancillary parking facilities as required under these approvals and in the judge's view, could unsurprisingly not have obtained final approvals in these circumstances. The judge was not persuaded by NAMDEVCO's submission that adequate alternative parking arrangements had been made, and went on to conclude that had the parking facilities as

envisaged been in fact constructed, there would be no need for market users to queue up for hours on the roadway before the gates were opened and there would be no opportunity for business to be conducted on the streets. She concluded that the situation would have been better managed and controlled if persons responsible for directing traffic and avoiding a build-up would have had a place to which all these vehicles could have been directed.

[17] The judge, in light of her findings, concluded that the claimant was entitled to damages given the levels of distress and inconvenience suffered over the years. With respect to the injunctive relief claimed, while recognising that the undertaking entered into by consent of the parties had brought about some respite, the judge was of the view that injunctive relief was still necessary, not only to ensure that the nuisance complained of by Mr Maharaj no longer subsisted, but to compel NAMDEVCO to meet both its statutory obligations and those imposed upon it under the common law.

[18] The judge accordingly granted the following relief:

a) NAMDEVCO shall pay to the claimant damages for nuisance assessed in the sum of $65,000.00.

b) An injunction is granted restraining NAMDEVCO:

i. From blocking the roadway at the turn off on the Churchill Roosevelt Highway and the Macoya Road Extension with vehicles.

ii. Permitting the buying and selling and/or conducting marketing and/or buying and/or selling activities in the environs of the Market on the roadway both of the Churchill Roosevelt Highway and the Macoya Road Extension.

iii. An injunction is granted compelling the defendant, its servants and/or agents to keep the Macoya Extension Road from the entrance on the Churchill Roosevelt Highway to Market Street, free from any obstruction or nuisance including inconsiderate and indiscriminate parking and/or vending in front of the gates to the claimant's property situate at No.3 Macoya Road Extension.

NAMDEVCO now appeals.

IV. Issues

[19] The issues arising on this appeal are:

i. There being a public nuisance, against whom does the action lie? If NAMDEVCO, can it rely on the defence of statutory authority.

ii. If NAMDEVCO is liable in public nuisance, the nature and scope of the remedy, including whether any injunction should be granted.

iii. The effect of the unannounced site visits by the trial judge.

V. Appellant's Submissions

[20] At the hearing of this appeal, counsel for NAMDEVCO, Mr Martineau SC, indicated that he would no longer be pursuing the question of the respondent's standing in bring this claim and conceded that as a resident within the vicinity of the Market, he had the necessary special interest to ground a claim in public nuisance.

[21] Notwithstanding this concession, it was submitted that no claim in public nuisance could be maintained against NAMDEVCO as the persons directly responsible for the nuisance complained of were the drivers of the vehicles who parked within restricted areas along the Macoya Road Extension and who generally refused to obey road traffic laws. It did not fall to NAMDEVCO to police the roadway as this was clearly outside of the scope of its powers, and it was for the TTPS or other relevant authority to maintain order and enforce the law relative to the public roadway.

[22] In the event that this court did not accept this first submission, alternative arguments were presented which were classified under four main headings as follows:

i. Statutory Immunity

ii. The Injunction

iii. Town and Country Approvals

iv. The Trial Judge's Site Visit

Statutory Immunity

[23] NAMDEVCO posited that it operated this market pursuant to a specific statutory authority granted to it to do so, and as such, in the absence of negligence, could not be made liable for a nuisance which is attributable to the exercise of its power as conferred except where the statute itself expressly attaches liability or expressly states that liability for nuisance is not exempted.

[24] NAMDEVCO, being empowered under the Act to establish and administer a wholesale market, was, in doing so, exempt from suit in nuisance barring negligence on its part in the exercise of this statutory power. There could be no nuisance as there was no finding of negligence made by the trial judge, nor was it established on the evidence before her. At all times NAMDEVCO acted reasonably, doing what was required, and in implementing certain measures, doing more than what could reasonably have been expected of it. Mr Martineau reemphasised his position that the public roadway did not fall within the remit of NAMDEVCO, even on a generous interpretation of what could be classified as the "immediate environs" of the Market. As such, the steps taken by it to have, through its Market Manager, the gates opened before the stipulated business hours for waiting users to park on the compound and not on the roadway; "No Parking" and "No Vending" signs posted outside of the Market; and to hire Police Officers at its own expense to monitor the traffic situation, went beyond what could reasonably have been expected of it. Taken together, these acts evidenced NAMDEVCO's reasonable conduct which undermined any basis upon which a finding of negligence on its part could have been made.

Injunction

[25] If this court disagreed with its position that no claim in public nuisance could be maintained against it, NAMDEVCO submitted that this was, nonetheless, a case in which an injunction ought not to have been granted. While acknowledging that the court maintained the discretion in nuisance cases to grant an injunction, give damages, or award a combination of both, this was not a case in which an injunction ought to have

been granted, even in contemplation of the *prima facie* position that injunctions ought to be granted in nuisance cases.

[26] Counsel for NAMDEVCO also posited that when Parliament intended a public body to execute specific functions as prescribed by statute, it was in the public interest that these functions not be curtailed by way of injunction. In these instances, public interest considerations will by necessity override the private right a citizen may have to an injunctive remedy. In this vein, Counsel also submitted that in the exercise of any discretion as to whether an injunction ought to be granted, regard must be had to the fact that it is the inevitable outcome of the operation of any market, wherever located, that there would be a build-up of traffic and some degree of interference or obstruction, a position which the courts themselves give credence to.

[27] As an alternative argument, Counsel submitted that even if this was a proper case in which an injunction ought to have been granted, the injunction granted by the trial judge was bad in law, being too wide and too vague, requiring NAMDEVCO to exceed its powers and trespass in the domain of other state entities (e.g. restricting parking on the public roadway was for the TTPS to enforce and NAMDEVCO had no power to compel compliance). Any injunction as granted ought to have attached solely to that which NAMDEVCO had the authority to do, e.g. open and/or close its gates at an appointed time.

Planning Permission

[28] On this point, Counsel argued that the issue of planning permission was of little or no value/relevance in a public nuisance case, the assessment criteria and considerations relevant to each exercise being distinct. Further, case law suggests that the granting of planning permission will normally not avail a defendant much if put forward as a defence to a claim. It was submitted therefore, that even though the appellant's failure to strictly comply with the terms of the planning permissions as outlined in the grant was being used by Mr. Maharaj, the respondent, as evidence of NAMDEVCO's culpability for the nuisance caused, the aforestated principle still applies as these were two divergent exercises employing disparate considerations. In any event, NAMDEVCO's failure to comply with

the terms of the grant was no longer actionable, being statute barred under section 26 of the Town and Country Planning Act.

VI. Respondent's Submissions

[29] The respondent asserts that the nuisance complained of was generated solely by the usage of the Market, as the vehicles responsible for same were those belonging to market users awaiting entry into the Market to conduct market business.

[30] The defence of statutory authority does not avail NAMDEVCO for the following reasons:

i. The appellant has not shown, nor can it be shown that the nuisance complained of was the inevitable consequence of operating a wholesale market at the Macoya Road Extension, or that the nuisance did not exceed that which would be caused by the actual operation of a wholesale market. By way of analogy, the Market was not similar in either establishment or operation to a refinery which, by virtue of its very existence, occasioned nuisances.

ii. Contrary to the appellant's submissions, several incidences of negligence were pleaded and established on the evidence. These included, *inter alia*, the absence of a feasibility study before placing the Market at the Macoya Road Extension, the lack of Town and Country approvals, and the failure on the part of the Market Manager to issue and implement necessary and relevant management directives for the efficient operation of the Market. These all amounted to negligent acts or omissions which led to the obstruction of the roadway by market users awaiting entry into the Market premises. It was therefore not correct for the appellant to suggest that there was no finding of negligence made (the trial judge having held that she did not need to do so as NAMDEVCO was strictly liable for the nuisance caused under the Act). In any event, there was sufficient evidence of negligence on the part of NAMDEVCO for this court to find that it was negligent.

iii. Given the findings of the trial judge that NAMDEVCO had no final approval to build the Market, the appellant could not now proffer a defence of statutory authority

when it had no legal authority to construct and operate the Market in the first place.

Injunctions

[31] The respondent submits that the appropriate order to be made by the court where a nuisance has been established is one which compels the responsible party to abate the nuisance. Further, an award of damages for the past nuisance suffered was also an appropriate additional order. If the court decides however that an award of damages was the sole order to be made in the circumstances of this case, the sum should reflect the conventional award based on the reduction in value of the respondent's property as a result of the continued nuisance. An increased sum may also be appropriate in lieu of the injunction (if revoked).

VII. The Law

[32] The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. "Nuisance is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of: (a) a right belonging to him as a member of the public, when it is a public nuisance; or (b) his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land when it is a private nuisance."[3]

[33] Public nuisance is a tort as well as a crime,[4] the ingredients of each being the same and acts as a measure of public protection.[5] The following definition of public nuisance found in Archbold (2005) was adopted by Lord Bingham in ***R v Rimmington***:[6]

[3] *Clerk & Lindsell on Torts* (22nd edn, Sweet & Maxwell 2018) 20-02.

[4] Both at common law and under section 70 of the Summary Offences Act, Chapter 11:02, which provides that: "Any person who causes a nuisance to the public and any person who at any time takes any part in causing such a nuisance, and any person occupying or having control over any house, yard or premises of whatever nature or permits such nuisance in such house, yard or premises is… liable on summary conviction to a fine of [$1500] or to imprisonment for six months."

[5] *R v Rimmington* [2006] 1 AC 459.

[6] *Ibid* [7].

> A person is guilty of a public nuisance…, who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property…or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.

[34] It is sufficient if the nuisance materially affects the reasonable comfort and convenience of a class of the public coming within the sphere or neighbourhood of its operation. This tort is actionable by an individual only where the latter can show that the defendant's conduct has caused him or her particular damage over and above that suffered by the general public, for example, through the obstruction of a highway; and moreover he or she must prove that such damage is direct and substantial: ***Vanderpant v Mayfair Hotel Co***.[7] The same act may constitute both a public and a private nuisance: ***Clerk & Lindsell on Torts 20-03***.

[35] The starting point for any analysis of the statutory obligations of NAMDEVCO must be the statutory scheme under which it operates. In the recent Caribbean Court of Justice decision of ***Titan International Securities Inc v The AG of Belize and the Financial Intelligence Unit***,[8] Rajnauth-Lee JCCJ had this to say with respect to the approach to statutory interpretation:

> The court's role in statutory interpretation has been settled. Parliament makes the law; judges interpret it. Judges have a duty to interpret an Act according to the intent of those who made it. The primary indication of legislative intention is the legislative text, read in context using internal aids, like other provisions in the act or external aids, such as the legislative history.

Reference was also made by her to another decision of the CCJ in ***Smith v Selby***[9] in which the court discussed the particulars of such an exercise:

> The principles which the judges must apply include respect for the language of Parliament, the context of the legislation, the primacy of the obligation to give effect to the intention of Parliament, coupled with the restraint to avoid imposing changes to conform with the judge's view of what is just and expedient. The courts must give effect to the intention of Parliament…
> …In *Rambarran v The Queen*, we noted that when a court is called on to interpret legislation it is not engaged in an academic exercise. Interpretation involves applying the legislation in an effective manner for the well-being of the

[7] [1930] 1 Ch 138 (Luxmoore J).
[8] [2018] CCJ 28 (AJ) [40].
[9] [2017] CCJ 13.

> community…Parliament's intention is discerned by understanding the objective of the legislation; what is the change that it is aimed to produce; what is its purpose. This often requires consideration of the social and historical context and a review of the legislation as a whole. But its intentions are also discerned from the words it uses. The underlying principle is that the court has a different function from Parliament. The court is ensuring that the legislative intent is properly and effectively applied. It is not correcting the legislative intent nor substituting its own views on what is a just and expedient application of the legislation.[10] [Citations removed]

[36] The enabling legislation came into force on 16 August 1991. NAMDEVCO is a body corporate: section 3 of the Act. Pursuant to section 4 thereof, its membership comprises of 9 members, 6 of whom are appointed by the President from among persons having special qualifications and experience in: (i) business management; (ii) finance and management accounting; (iii) produce marketing and trade; (iv) food technology or agro-industry; (v) information technology; and (vi) agricultural production with special reference to small farming. The executive appoints the other 3 members, one each from the Ministry responsible for Agriculture and the Tobago House of Assembly, and the third being the Chief Executive Officer.

[37] The core functions of NAMDEVCO are embodied in section 9 (1) of the Act, namely "to create, facilitate and maintain an environment conducive to the efficient marketing of agricultural produce and food products through the provision of marketing services and the stimulation of business investment in the agro-industrial sector of Trinidad and Tobago". There appears to be a significant policy component geared towards stimulating the growth of the agro-industrial sector, which is indicative of a deliberate step toward diversifying what has largely been an energy-dependent economy. As an avenue to this end, section 9 (2) of the Act confers permissive powers ("the Corporation may") on NAMDEVCO to, *inter alia*:

> (a) facilitate and promote the effective and efficient marketing of agricultural produce and food products and advise on the importation of and the mechanisms available to enlarge the local and international markets for such produce and products; …

[10] *Ibid* [9] & [12].

(c) establish and administer wholesale markets for agricultural produce and food products; …
(e) facilitate the promotion of agro-industrial development; …
(j) do all things necessary or incidental to the foregoing and generally carry out the provisions of this Act.

[38] Pursuant to section 9 (2)(c), the National Agricultural Marketing Development Corporation (Northern Wholesale Market) regulations No 50 of 2002 (the Regulations) made under section 31 of the Act established the Market. The Market is one of two specifically designated wholesale markets, the other being located in the southland, and by reasonable inference, the Market may be viewed as having been established to serve the north-eastern sector of the Island.

[39] Part II of the Regulations purports to regulate the management of the Market. This is effected by the appointment of the Manager (at section 3 (1)) who shall be responsible for the efficient management of the market and may for that purpose implement management directives with respect to, *inter alia*:

…
(d) fixing the times during which the Market shall be opened for business;
(h) removing nuisances or obstructions in the Market or in the immediate environs thereof; and
(i) doing anything necessary or expedient for the exercise, performance and discharge of his power, functions and duties or for giving effect to these Regulations.

VIII. Analysis

[40] NAMDEVCO's preliminary contention is that the judge was wrong to ascribe to it responsibility for the nuisance complained of and ordering that it was its responsibility to abate same. NAMDEVCO asserts that the parties directly responsible for the nuisance are those who parked their vehicles indiscriminately along the Macoya Road Extension and it is for the TTPS or other relevant authority to ensure that this did not occur. Therefore, no action in public nuisance could have been maintained against it, as it was neither responsible nor liable for the nuisance caused.

[41] Notwithstanding Mr Martineau's clearly expressed concerns with respect to some of the authorities, the law with regard to public nuisance and who may be held liable for it has been settled for well over 150 years. The law succinctly stated is such that, if the natural and probable consequence of what the defendant is doing is to collect a crowd so as to obstruct the highway, that may be an actionable (indictable) nuisance; and, if it is one which occasions damage to an individual, may give him a right of action in respect of it: ***Rex v Moore***;[11] ***Barber v Penley***;[12] ***Lyons, Sons & Co. v Gulliver***.[13]

[42] In ***Lyons***, in consequence of a popular performance daily at the defendant's (Gulliver's) theatre, access to the plaintiffs' adjacent premises was obstructed during important periods of the day by reason of the assembling of a crowd and the formation of a queue in front of the plaintiffs' premises prior to the opening of the theatre. The court of appeal upheld the decision of the trial judge, holding, that in the circumstances the obstruction was an actionable nuisance warranting the grant of an injunction. Cozens-Hardy MR stated:[14]

> Now what is the state of things, or what was, before this action was brought, the state of things, with reference to (I will take) the morning performance? The Palladium was, and I have no doubt is, a very popular place of entertainment. The queue in question is formed by people who desire to get places in the sixpenny upper circle. On the evidence, as the learned judge has found, and I think we must accept his finding, that there has been such an unreasonable use and obstruction of the highway, and such obstruction and annoyance, as amounts in law to a public nuisance, by which the plaintiffs have been specially and in particular, injuriously affected…

It was also posited by the defendant in that case that it was the duty of the police to do what was necessary with regard to the public roadway, and he (Gulliver) could do nothing with respect to that as it lay outside of its remit. The court of appeal further held that the failure of the police to prevent obstruction by regulating the crowd and keeping proper gaps for the passage of the public through the queue did not afford a good defence by

[11] (1832) 3 B & Ad 184.
[12] [1893] 2 Ch 447.
[13] [1914] 1 Ch 631.
[14] *Ibid* p 640.

which the defendant was entitled to escape liability for which the law clearly establishes is a wrong, i,e. collecting crowds to the extent that the highway was obstructed.

[43] While this court appreciates that NAMDEVCO is not authorised to police the public roadway, it does not follow that where the law clearly establishes that a party may be made liable in nuisance for obstruction to the highway if it is the natural and probable consequence of its actions, NAMDEVCO is entitled to assert that it has no authority over the public roadway and is therefore in no way liable.

[44] This position is untenable for two reasons. Firstly, that the intervening acts of a third party, for example, the police, may have the effect of abating the nuisance does not, to my mind, negate the fact that a nuisance was made out which NAMDEVCO, in law, may be held responsible for, as it was its operations which led to the gathering of the crowds and consequential obstruction of the Macoya Road Extension. Secondly, the complaint against NAMDEVCO is very specific. It is contended that the obstruction to the Macoya Road Extension occurred as a result of its failure to open its gates in a timely fashion. Therefore, the power to abate the nuisance complained of via a slight alteration to its operations lay at all times in NAMDEVCO's hands, i.e. opening its gates earlier. Thus, the intervention of the TTPS is not the sole or even primary means through which relief can be occasioned. The nuisance may be obviated to a significant degree through actions which are completely within NAMDEVCO's remit and it is therefore not open to it to in effect suggest that responsibility cannot attach as it does not have the power to remedy the nuisance complained of.

[45] I am therefore of the view that at the time when the action was brought below, Mr Maharaj had an actionable case in nuisance which could rightly have been sustained against NAMDEVCO. It is the natural and probable outcome of the operation of a wholesale market that crowds of users would gather. It is this gathering of users which led to the obstruction of the Macoya Road Extension, and as already conceded by NAMDEVCO, occasioned damage to Mr Maharaj and gave him a right of action in respect of it.

[46] I now turn to determine whether or not liability can be avoided through NAMDEVCO's alternative argument, that it is immune from suit in nuisance having operated pursuant to a vested statutory authority.

[47] It is submitted by NAMDEVCO that the construction of the Market was undertaken pursuant to the Act, which authorised the construction of markets, including wholesale markets, all in pursuit of its objectives as particularised in section 9(1). Further, the language employed specific to the establishment and operation of wholesale markets[15] suggests that this authority as prescribed is in the vein of a permissive power as opposed to a mandatory duty (the Corporation may…establish and administer wholesale markets…), the material implications of which will be made plain with the statement of the law which follows below. The respondent has not challenged this reading and interpretation of the Act, and rightly so, and the court is of the view that this is the only conclusion to be arrived at on a plain reading of the relevant section and the Act as a whole.

[48] Again, the law with regard to statutory authority is well settled. The following propositions were enunciated by Webster J in ***Department of Transport v North West Water Authority***[16] and subsequently approved by the House of Lords:[17]

I. In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a duty imposed by statute;
II. It is not liable in those circumstances even if by statute it is expressly made liable, or not exempted from liability, for nuisance;
III. In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a power conferred by statute if, by statute, it is neither expressly made liable, nor expressly exempted from liability, for nuisance;
IV. A body is liable for a nuisance by it attributable to the exercise of a power conferred by statute even without negligence, if by statute it is expressly made liable, for nuisance.[18]

[15] Section 9 (2) (c).
[16] [1983] 3 WLR 105 at 109.
[17] [1984] AC 336 at 359.
[18] See *Clerk & Lindsell on Torts* (n 3) 20-92 for authors' reasons for suggested modification of IV.

[49] As was also affirmed by the House of Lords, negligence in the context of the exercise of a statutory duty or power carries with it a special meaning, that is, it requires the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons.[19]

[50] Having determined that NAMDEVCO was empowered to establish and operate the Market pursuant to section 9(2)(c), and being satisfied that the Act does not contain a nuisance clause, this case falls within the remit of proposition III as articulated above. Stated otherwise, NAMDEVCO contends that the nuisance complained of, that is, the obstruction to Mr Maharaj's right of ingress and egress from his home located obliquely opposite to the Market's West Gate as a result of traffic build-up, congestion and gridlock on market days, was the inevitable consequence of, or reasonably incidental to the exercise of its statutory power to establish and operate the Market, it having done so without negligence. The court does not accept this submission, preferring instead the respondent's to the extent that the nuisance complained of cannot be deemed to be the inevitable consequence of the operation of the Market. To the extent that the judge found that the Act and the Regulations imposed upon NAMDEVCO a statutory obligation to prevent obstructions and nuisances in and around the Market and its environs, even in the absence of negligence, I am of the respectful view that there was a serious error of law such as to affect the manner of her approach to the defence of statutory authority. Before proceeding further, the court reminds that the state of affairs which prompted the filing of this claim below is not that which exists today, having now, in my view, been substantially alleviated[20] through the undertakings entered into at varying stages of the proceedings. The court's conclusion with respect to the inevitable outcome and the analysis which follows focuses on that period of time, prior to the undertaking of 21 December 2011, in which the respondent was unable to access his home freely as a result of the traffic build-up, congestion and gridlock.

[19] House of Lords in *Ministry of Transport* affirmed the dicta espoused in *Geddis v Proprietors of Bann Reservoir* (1878) 3 AC 430, 455 (Lord Blackburn).

[20] The rationale for which is revealed below.

[51] In ***Allen v Gulf Oil Refining Ltd***,[21] the House of Lords confirmed that where a nuisance has been established and the defence of statutory immunity is put forward, it is for the statutory undertaker to show that it was impossible to do the thing it has been empowered so to do in conformity with Parliament's intention, without creating the nuisance alleged, or at least a nuisance. In that case, it was held that where Parliament authorised the construction and operation of a refinery, not only was it inherently authorising a change in the environment and an alteration of the standard of amenity and comfort which neighbouring occupiers might expect, but it also cloaked the statutory undertaker with immunity from suit in proceedings for any nuisance which can be shown to be the inevitable result of erecting a refinery on the site. The underlying philosophy of such an approach is that "the greater public interest arising from construction and use…must take precedence over the private rights of owners and occupiers of neighbouring lands not to have their common law rights infringed by what would otherwise be actionable nuisance. In short, the lesser private right must yield to the greater public interest."[22] Such an approach is consistent with good sense, as it would be entirely contradictory to on the one hand permit the undertaker to pursue a stated objective which carries with it, no matter how carefully executed, the potential to impact or compromise private rights, without affording to it some protection from suit in its pursuance thereof.

[52] This protection as afforded is not unqualified however. As was stated in ***Geddis v Proprietors of the Bann Reservoir***,[23] the authority of Parliament to construct and use certain works does not relieve the undertakers from their obligation to take due care that their operations do not cause injury to neighbouring proprietors. As articulated by Lord Dunedin in ***Manchester Corporation v Farnworth***:[24]

> When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised.

[21] [1981] AC 1001.
[22] *Ibid* 1023 (Lord Roskill).
[23] (1878) 3 AC 430.
[24] [1930] AC 171, 183.

> The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible, but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

Anything which falls short of this standard will be negligent conduct in pursuit of the statutory mandate having regard to the special meaning as set out above.[25]

[53] The photographic and other evidence establishing the nuisance led by the respondent and accepted by the trial judge has not been challenged as not being indicative of the state of affairs that existed prior to the 21 December 2011 undertaking. Proceeding therefore to apply the tenets of law espoused above, it was for NAMDEVCO to show that the nuisance complained of was the inevitable result of establishing and operating, not the Market, but any wholesale market as must reasonably have been regarded as within the contemplation of Parliament when it authorised such a course under the Act. To the extent that the actual nuisance caused by the Market exceeds that for which immunity is conferred, Mr Maharaj is entitled to a remedy.[26]

[54] NAMDEVCO has not satisfied this court that the nuisance complained of during the relevant period was the inevitable result of establishing and operating a wholesale market. It cannot be a reasonable conclusion that, in permitting the establishment and operation of wholesale markets, Parliament intended that neighbouring residents would suffer such an extensive infringement upon their right to the enjoyment of their properties. Consonant with an approach which, at the very least is rooted in an appreciation of practical realities and the common sense approach alluded to by Lord Dunedin in ***Manchester Corporation v Farnworth***, Counsel for the respondent conceded that what was required was some give and take between his client and NAMDEVCO, and a perfect, uninterrupted system of access was not in fact being advocated for. The court endorses such a view and would go further to suggest that the operation of a wholesale market, especially one which serves such a wide cross-section of the populace as the

[25] [49]
[26] *Allen v Gulf Oil* p 1014 (Lord Wilberforce).

Market, will attract a significant number of market users. Some degree of inconvenience, be it delayed access as occasioned by traffic build-up or otherwise, is reasonably incidental to the establishment and operation of a wholesale market. It follows therefore that, a reasonable inference to be drawn is that Parliament, in empowering NAMDEVCO to pursue such an undertaking, would have appreciated this potential impact upon private rights and authorised same. Conversely, it could not be that Parliament contemplated and countenanced such an absolute or disproportionate suppression of private rights occasioned by the type of nuisance complained of. A not substantial delay or obstruction to one's right of ingress and egress could reasonably have been expected, but not so a substantial delay or obstruction which saw an almost absolute denial of access for extended periods of time.

[55] The cause of the nuisance as alleged by the respondent was the failure of NAMDEVCO to open the Market's gates in a timely fashion, which resulted in market users queueing up for hours on the roadway awaiting entry. In fact, it was the evidence of the Market Manager that prior to and since the commencement of the claim, upon observation of the situation on any given day, he would in his discretion cause the gates to be opened before the designated hour to help ease the traffic situation.[27] It was not until this court's intervention however, that NAMDEVCO gave a specific undertaking to open the gates and the Market for business at 5.30am, which, the respondent did not categorically deny, brought about immediate relief.[28] This is relevant as the power granted to NAMDEVCO was not only to establish wholesale markets, but to administer same.[29] Taken with Parliament's presumption that the power as granted is to be exercised with all reasonable regard and care for the interests of other persons, it follows that NAMDEVCO in administering/operating wholesale markets is expected to do so efficiently. Efficient operation dictates that NAMDEVCO do all that is reasonably within its remit to limit nuisances occasioned to that which could be strictly classified as unavoidable in the

[27] Witness Statement of Prakash Narinesingh filed 30 September 2013.
[28] Mr Sanguinette, in seeking to maintain that a nuisance was still being caused, trained his guns, not on the appellant's failure to open its gates, but on the fact that retail marketing continued to take place outside of the Market compound, even directly in front of the respondent's property.
[29] Section 9(2)(c) of the Act.

context of a wholesale market's operations. Support for this view is confirmed when the Regulations, specifically regulation 3 (1) (h), is considered. This regulation empowers the Market Manager to, among other matters, implement management directives with respect to the removal of nuisances or obstructions in the Market or in its immediate environs. This court is of the view, and both parties agree, that the Act and Regulations as a whole do not impose upon NAMDEVCO a strict liability, and in coming to the conclusion that they did, the trial judge erred. Nonetheless, by identifying "nuisances and obstructions" and empowering the Market Manager to address same specifically, it suggests that Parliament was not only cognizant of the unavoidable nuisances inherent in the operation of a wholesale market, but the potential for these same nuisances to become actionable if their effects did not remain within the sphere of what amounts to the natural and inevitable result of market operations. To this end therefore, the Manager was charged with the responsibility of issuing relevant management directives to address nuisances and obstructions where necessary. While the court is not oblivious to the fact that hiring members of the TTPS or causing the gate to be opened some hours before the stipulated trading times would carry with it cost implications at the very least, it also considers such incidental accommodations to be reasonable, not only in light of the responsibility NAMDEVCO as a statutory undertaker must bear in the exercise of its given authority, but in contemplation also of the gravity of the nuisance which remained substantially unabated until the court's intervention. The appellant's failure to address the nuisance complained of prior to the court's intervention and the securing of the undertaking of 21 December 2011, evidenced a negligent failure in the administering of the Market. Again, it cannot be a reasonable conclusion that Parliament in authorising the establishment and operation of wholesale markets wherever in Trinidad and Tobago, implicitly authorised a nuisance of such gravity.

[56] It follows therefore that to the extent to which the Market's operations occasioned a nuisance beyond which it can be inferred that Parliament intended to provide immunity, Mr Maharaj was entitled to a remedy.

Post the Undertaking of 21 December 2011

[57] The further issue that arises for consideration is as to the liability of NAMDEVCO after the undertaking of 21 December 2011.

[58] As revealed in the trial judge's judgment, both NAMDEVCO and Mr Maharaj agreed that the implementation of the terms of the undertaking brought about immediate and significant relief to the latter.[30] Indeed the judge stated at paragraphs 13 and 14 of her judgment:

> [13] On the effect of the interim injunctions, Mr. Maharaj said very candidly that there had been significant relief since the matter began, but he did not accept that the problem had been eradicated…
> [14] So the real question that I have to decide at the end of this case is whether I should grant an injunction. As I said, **it is conceded by the claimant that there has been significant improvement but he has established that the problem is still there…** [emphasis added]

Paragraph 14 however, with the greatest of respect to the judge, presents what can only be described as two wholly inconsistent conclusions when viewed through the lens of Mr Maharaj's claim and NAMDEVCO's defence of statutory authority.

[59] Respondent Counsel (Mr. Sanguinette) conceded that this claim has always been about the obstruction to the Macoya Road Extension and the consequent interference with Mr Maharaj's right of ingress and egress from his home. He contended that the obstruction and inconvenience caused resulted from NAMDEVCO's failure to open its gates timeously, which would have allowed the market users to enter the compound and not assemble on the roadway. This places into proper perspective Mr Sanguinette's continued references to retail marketing and the general business of the middlemen taking place outside of the Market compound, as well as the consequent activities of the much maligned barrowmen. These are not separate 'heads of complaint' or stand-alone nuisances, but incidental occurrences which flowed from the gathering of market users, usually many hours before scheduled business hours, awaiting entry into the Market. In fairness to the trial judge, such a definitive statement of the issue was hard-earned, and was the product of focused interrogation and much refinement at the hearing of this appeal. This was never a claim seeking to compel NAMDEVCO toward enforcement of its own policies

[30] [10].

relative to retail marketing,[31] nor the legitimacy or illegitimacy of middleman business or barrowmen. Simply put the issue was whether, being responsible for the gathering of market users and their consequent obstruction to the Macoya Road Extension, NAMDEVCO was liable for suit in public nuisance, or, could it avail itself of the defence of statutory authority.

[60] It appears that Mr Maharaj initially desired (and advocated for at trial) an existence free from any obstruction and inconvenience when entering and exiting his premises located on the Macoya Road Extension.[32] It is evident from the trial judge's decision and the relief granted[33] that she similarly envisaged as a satisfactory outcome the almost, if not total eradication of indiscriminate parking on the roadway, middleman activities, retail marketing, barrowmen and the like. This ought not to have been the focus. Having determined that NAMDEVCO was a body purporting to act in pursuit of a statutory power in the establishment and administering of the Market, what was then required was an assessment geared toward determining whether or not they were negligent in pursuit of this mandate. If NAMDEVCO did act negligently in administering the Market, determination of the extent of its liability remained, as it could only be rightly made responsible for that which exceeded the range of protection it is presumed Parliament intended to afford. For as long as NAMDEVCO acted without negligence in pursuit of its mandate and did all that could reasonably have been expected of it relative to any nuisances complained of, such nuisances may rightly have been classified as those falling within the sphere of inevitability, and consequently non-actionable. A "perfect solution" for Mr. Maharaj ought not to have been the focus of the trial judge's attention, as this could only have been realistically attained via the complete closure of the Market.

[61] This misplaced focus, aggravated by the imprecise nature of the claim placed before her, goes some way toward explaining her inconsistent conclusions regarding the significant improvement post the 2011 undertaking, and her finding that the nuisance continued

[31] Whether or not this was in fact an enforceable policy or rule has not been definitively established and does not, in any event, require determination in respect of this appeal.

[32] Unlike his very reasoned and commendable approach before this court whereby he constantly expressed through his Counsel that this situation required some give and take between the parties.

[33] The injunctions specifically.

unabated up to the trial in 2013, requiring therefore the finality of a judicial pronouncement. What is in fact revealed by the respondent's evidence immediately preceding the trial in 2013 is a scene vastly different from the "nightmarish" and "chaotic" scenes prior to the 2011 undertaking. It is clear that an avenue of access to and egress from Mr Maharaj's premises was now available, notwithstanding the continued presence of market users and their vehicles on the roadway, retail marketing and barrowmen. Despite the claim being tied to NAMDEVCO's failure to open its gates in a timely fashion, it seems to me by undertaking to procure additional "No Parking/No Waiting" signs, and, more importantly, hire at its own expense members of the TTPS to assist with traffic regulation during market hours, NAMDEVCO was able to in effect secure a solution that nonetheless brought about significant relief to Mr Maharaj in the proper context of his claim. A reasonable conclusion may therefore be that via this alternative approach, NAMDEVCO was able to bring itself within what Parliament is presumed to have countenanced in granting to it the authority to establish and administer a wholesale market.

[62] To this may be added the events occurring before this court. On 8 April 2016, the parties entered into another undertaking in a bid to compromise the appeal. It was thereby agreed that NAMDEVCO would:

> Open the Market gates at 5:30am and to open the Market for business at 5:30am and to use its best endeavours to prevent retail marketing within the compound of the Market until 26 July 2016.[34]

The parties returned on 26 July 2016 and there asked to report on the success or failure of the undertaking given on the last occasion. Counsel for the respondent initially reported that the steps taken had been essentially ineffective, asserting that the earlier business hours had only succeeded in encouraging scores of market users to gather at the Macoya Road Extension at an even earlier hour. When pressed and when reminded of his substantive complaint, that is, access to and egress from his client's premises, the following exchange was recorded:

[34] Transcript of Proceedings dated 8 April 2016 p 11.

> Justice of Appeal Mendonca: By that time, the home owner is looking to come out. So if the road is clear by then, then nuisance is alleviated.
> Mr. Sanguinette: Yes, certainly. Once, I think for everybody in the neighbourhood, generally.

After this acknowledgment however, Mr Sanguinette's focus appeared to shift more to NAMDEVCO's apparent failure to eliminate retail marketing. Subsequent exchanges in which this court again reminded and re-established the parameters within which the claim must be viewed ensued, and in its course disclosed a general reluctance on the respondent's part to discharge this undertaking given by NAMDEVCO. In fact, when required to provide a final answer as to its continued existence, he endorsed it, notwithstanding previous averments to its futility.

[63] By these concessions, this court is satisfied that a solution with which all parties must now be satisfied has been arrived at. Mr Maharaj must now put into practice his much heralded willingness to compromise relative to NAMDEVCO's business of operating the Market, and NAMDEVCO in turn must remain committed to maintaining the requisite standards in the performance of its statutory mandate.

[64] With regard to the injunctions granted by the judge below, prior to the undertaking of 2011, I do not think that it can be reasonably argued that a court, in the exercise of its discretion,[35] would have concluded that Mr Maharaj would not have been entitled to an injunction in terms necessary to arrest the nightmarish and chaotic situation that had by that time developed. Nonetheless, as was conceded by Mr Maharaj and confirmed by the trial judge in her judgment, following the 2011 undertaking, the situation had significantly improved. It is my view therefore, that in light of the accepted significant improvement, an injunction in the limited terms of the voluntary undertaking may have been justified in all the circumstances of this case. For the inconvenience suffered for the relevant period prior to the undertaking of 2011, Mr Maharaj could have been properly compensated in damages.

In consideration of the aforesaid, it follows that I agree with NAMDEVCO that the injunctions granted by the trial judge were unduly wide, too general in their terms and

[35] *Coventry v Lawrence* [2014] UKSC 13 [120] (Neuberger JA).

not supported in law. The effect of these injunctions as granted may have required NAMDEVCO to enforce the criminal law, something it quite simply cannot do.[36]

The Trial Judge's Site Visit

[65] NAMDEVCO commenced its submission on this point by acknowledging that whether or not the court chooses to visit the *locus in quo* is purely the exercise of a discretion in circumstances where it would be impossible to bring the object of the dispute to court, or to crystallize in its own mind the evidence presented via photographs, drawings etc. However, it was further submitted, this exercise as conducted by the trial judge was improperly undertaken for the following reasons. Firstly, upon arriving at her decision that a site visit was necessary, the judge ought to have requested that the attorneys from both sides accompany her. Alternatively, if she determined that an individual visit was best, she nonetheless should have informed both sides of her visit, what had been observed, and invited responses on same. The adoption of either of these courses was of vital importance in the circumstances of this case as the object central to the dispute, i.e. the Macoya Road Extension, was what may be described as a fluid scene, where the obstruction complained of could very well have been more pronounced, or even less pronounced on certain days, and would not therefore have provided a true representation of the facts when observed by the court.

[66] NAMDEVCO therefore asserted that the risk of prejudice befalling it through the court's observation of a fluid situation, especially without the input of Counsel, was elevated and ran counter to the principles of natural justice to the extent that it could not readily be discerned how much of an influence it had on the mind of the judge relative to her eventual findings on the facts in favour of the respondent. This in and of itself, NAMDEVCO submits, forms the basis upon which the decision of the court below ought to be set aside.

[67] Counsel for the respondent in turn submitted that the site visits as conducted by the judge to the *locus in quo* do not warrant a retrial, as it is clear that it did not serve to

[36] It is worth remembering that public nuisance (n 4) and obstruction of the highway (section 50, Highway Act Chap 48:01) are both criminal offences.

augment the evidence already proffered at trial, but to reinforce the impression she had already formed that there was a problem with traffic build-up in the area. The time and date of her visits were therefore of little relevance. The substantive rights of either of the parties were not impacted negatively by virtue of her visits.

[68] The judge at paragraph 36 of her judgment disclosed:

> In the course of it [this matter], parties invited me to visit the area to make my own observations. I have since the close of the evidence made some unannounced visits specifically for the purpose of doing so. Further, in passing by the area from time to time I have paid particular attention to the condition of the road. It is obvious that as the claimant described, the problem comes about as a result of the accumulation of traffic before the gates are opened. Wholesalers, middlemen and buyers with the aid of barrow men run a street market as they await entry in the gates of the compound.

[69] The Civil Proceedings Rules 1998 ("CPR") 40.5 expressly empowers the court to "inspect any place or thing that may be relevant to any issue in the claim." The decision to inspect is therefore a matter of judicial discretion.

[70] This discretion must however be exercised judicially. The principles of natural justice and adherence thereto are the foundational elements of any judicial exercise and a court must be vigilant in recognising the potential for their contravention and err always on the side of caution in order to ensure that they remain uncompromised. NAMDEVCO's concerns with regard to the judge's exercise of her discretion to visit the *locus in quo* are legitimate ones. The physical setting which formed the basis of the nuisance complained of was not static and could realistically be subjected to change, whether significant or not, on any given day. Courts should recognise and give credence to such a reality when contemplating the exercise of its discretion to visit scenes which are fluid in nature and be guided accordingly. The trial judge in these circumstances ought to have given notice of her intended visit and should have either invited Counsel from both sides to accompany her, or, if choosing to venture independently, disclosed her observations to them and solicited their responses on same.[37]

[37] *Salsbury v Woodland* [1970] 1 QB 324.

[71] Nevertheless, in the specific circumstances of this case, I agree with the respondent's submission that these site visits did not result in any unfairness to NAMDEVCO. Mr Maharaj's pictorial evidence depicting the nuisance caused was not substantially challenged by NAMDEVCO below. In fact, evidence led by its own witnesses corroborated the respondent's assertions of significant obstruction and traffic gridlocks caused by market users at the time of the commencement of proceedings. In any event, the judge's conclusion emanating from these site visits, namely that the congestion comes about as a result of the accumulation of traffic before the gates are opened, was undisputed. There was therefore sufficient evidence before her to independently substantiate her eventual findings on the facts of this case, and I am of the view that the appellant's fears are misplaced with regard to the extent to which her site visit would or could have influenced her mind relative to these findings.

IX. Conclusion

[72] In addition to the above conclusions as set out, I would add the following.

[73] On the issue of damages, Mr Martineau is no longer challenging the quantum awarded, neither has there been any cross-appeal by the respondent.

[74] It is clear that NAMDEVCO has succeeded in its contention that it could avail itself of the defence of statutory authority following the implementation of the 21 December 2011 undertaking. It is equally clear that Mr Maharaj was entitled to a remedy in public nuisance for the distress and inconvenience caused prior to the implementation of the 2011 undertaking, as this lay outside of the scope of any nuisance that Parliament could reasonably have intended to protect against. There is therefore no basis for interference with the trial judge's award of $65,000.00 as damages for the public nuisance complained of.

[75] Having regard to the accepted effect of both the 2011 and 2015 undertakings, as well as my findings with respect to NAMDEVCO's responsibility to administer the Market and mitigate against actionable nuisances, I am of the view, in the exercise of the court's discretion, that injunctions giving permanent effect to the terms of both of these

undertakings (with some modifications) are just and proportionate in all the circumstances of this case.

X. Disposition

[76] The appeal is allowed in part.

[77] The judge's Order with respect to the quantum of damages awarded to Mr Maharaj is hereby affirmed.

[78] The judge's Order with respect to the injunctions is set aside, and in its place is substituted the following:

I. An Order that NAMDEVCO do open the gates of the Market no later than 5:30am and do open the Market for business no later than 5:30am.

II. An Order that NAMDEVCO cause to be placed and maintained "No Parking/No Waiting" signs on the Macoya Road Extension in the vicinity of the entrance to the Market during business hours.

III. An Order that NAMDEVCO do provide a minimum of two uniformed police officers from the TTPS during the Market's business hours, for the purpose of regulating and controlling the flow of traffic along the Macoya Road Extension, unless this is not possible for reasons beyond NAMDEVCO's control.

IV. There will be liberty to apply to a judge of the High Court in respect of the modification or discharge of any of these injunctions.

[79] On the issue of costs, even though Mr Martineau argued against NAMDEVCO being liable in nuisance, I have found that liability attaches to NAMDEVCO for the period immediately preceding the undertaking of 21 December 2011. Thereafter, NAMDEVCO has succeeded in its contention that the defence of statutory authority was available to it. Nonetheless, as is obvious from this judgment, it was just and proportionate that an injunction be granted against NAMDEVCO in terms as set out above. I find therefore no reason to disturb the judge's Order with respect to the costs as awarded below. Having regard to the fact that Mr Martineau has garnered only partial success on his appeal, I am of the

view that an appropriate Order for costs would be that NAMDEVCO pays to Mr Maharaj one-half of the costs of this appeal.

P. Moosai

Justice of Appeal