IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 198 of 2012

BETWEEN: SOPHIE VIART DEMORE
Claimant

AND: IAN SHAW and SANDRINE SHAW
Defendants

Coram: ***Chetwynd J***

Parties: ***Mr. Thornburgh for the Claimant***
Mr. Ngwele for the Defendants

Hearing ***16th , 17th and 18th June 2015***

Decision ***1st July 2015***

JUDGMENT

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1. The Defendants acquired a residential lease over land in 1999. In 2001 the Claimant acquired a residential lease of adjoining land. The evidence is not entirely clear so it is not known whether there was a building on the Claimant's land at that time but it does appear that sometime in 2008 her daughter began living in a house there. Previously the daughter had been living with her husband on another property close by. The Defendants began running a business on their property and again the evidence is unhelpful as to whether that was in 2003 or later in 2005/2006. The evidence points towards the Defendants entering into some kind of contractual relationship with another business concern called Toa Farms to produce either chickens or eggs or perhaps both. At some stage Toa Farms was sold and apparently the contract came to an end. The Defendants went into production of eggs and/or chickens on their own account.

2. Initially it appears the Defendants used some 5 or 7 open sided sheds or structures for their business. The business grew and some of those sheds were demolished and replaced by a shed said to be 70 metres long. That presently houses some 10,000 chickens in 1440 cages. The Claimant's case is that the noise, smell and water contamination from the Defendants' business are a nuisance and have affected her quality of life. The Defendants deny this.

3. There is a difference in law between a public nuisance and a private nuisance. A public nuisance is a crime whereas a private nuisance is a tort. It is quite possible for the same conduct to amount to both. In many cases a public nuisance is proscribed by

statute and would be prosecuted under the criminal law rather than at common law. In jurisdictions where there is extensive legislation dealing with the control of environmental damage this is sometimes called statutory nuisance as a species of public nuisance. Here we are dealing with an allegation of private nuisance. Private nuisance may be described as an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it.[1] The authors of Winfield [2] submit the tort takes three forms: encroachment on a neighbours land; direct physical injury to the land; or interference with the enjoyment of the land. That proposition has been accepted as an accurate statement of the law in cases too numerous to cite. It is the third form of nuisance the Claimant seeks to establish in this case. As the authors of Winfield also point out, the varieties of the third form are almost infinite and that the essence of this type of nuisance is a state of affairs that is either continuous or recurrent. From the case law available it is apparent that whether the interference is actionable or not also depends on many, or an infinite number of, variables.

4. There is however one central issue in the law of nuisance, the reasonableness of the defendant's behaviour. It was said by Lord Wright in the case of *Sedleigh-Denfield v O'Callaghan* [3]:

> *"A balance has to be maintained between the right of an occupier to do what he likes with his own, and the right of his neighbour not to be interfered with."*

It is clear then there must be some give and take but at the same time the maxim *sic utere tuo ut alienum non laedas* [4] is often quoted. In truth the maxim is not now considered to be a wholly accurate statement of the law because, as is pointed out in Winfield [5] the law repeatedly recognises that a person may use his own land so as to injure another without committing a nuisance. It is only when such use is unreasonable that it becomes unlawful.

> *"Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances."*[6]

This requirement was emphasised in *Sedleigh-Denfield* by the use of slightly different language and described as being a question of the defendant's conduct in using his land, such use being required to be:

> *"...according to the ordinary usages of mankind living in...a particular society"*[7]

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[1] See *Read v Lyons & Co Ltd* [1945] KB 216; *Howard v Walker* [1947] 2 All E.R. 197 and *Hargrave v Goldman* (1963) 37 A.L.J.R. affirmed [1967] 1A.C. 645

[2] *Winfield & Jolowicz on Tort* (17th edn), p. 646

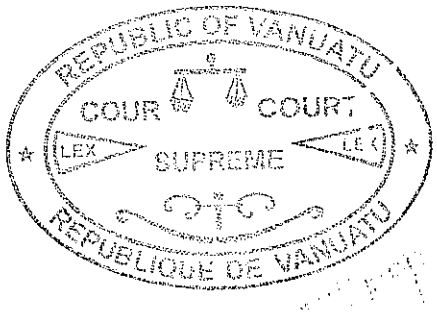
[3] *Sedleigh-Denfield v O'Callaghan* [1940] A.C. 880

[4] Use your own property in such a way as not to harm others

[5] Ibid p. 647

[6] *Bamford v Turnley* (1862) 3 B. & S. 66

[7] Ibid p.903



There is a distinction, which may be hard to grasp at first, in reasonableness in an action in negligence and reasonableness when looking at nuisance. In nuisance it is the reasonableness of the defendant's conduct rather than as in negligence where the test is whether someone took reasonable care. In nuisance the court will take into account all the relevant and competing interests of the parties and if the conclusion reached is the interference is excessive then the defendant will have no defence even if he took all reasonable care to minimise the nuisance.

5. What this means is that if the defendant has created a nuisance, it is actionable; but the reasonableness of his conduct is relevant in determining whether he has in truth created a nuisance. A balance has to be maintained between *"the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with"* [8] In this context reasonableness *"is a two sided affair"* [9] it is not enough to ask if the defendant has acted reasonably; it must be asked if he has acted reasonably having regard to the fact he has a neighbour. [10] In simple terms, the question of nuisance is one of fact.[11]

6. One important fact to consider is the nature of the area in which the nuisance is said to have occurred. The leading case in that regard is *St.Helen's Smelting Co v Tipping* [12] where the court said it was necessary to;

> *"Take into account the circumstances and character of the locality in which the complainant is living and any similar annoyances which exist or previously existed"*

Most law students, no matter where they come from, will most likely be able to quote the words of Thesiger LJ which, rather condescendingly perhaps, encapsulated that concept in an earlier case [13];

> *"What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey"*

Of course the court did emphasise in the St Helen's case that not every change in the use of land, even one having a deleterious effect on neighbours, would necessarily constitute a nuisance.

> *"The law does not regard trifling inconveniences; everything is to be looked at from a reasonable point of view".*

7. The St Helen's case is not without difficulty especially as the court spoke of "*sensible value to property*" and "*material injury*" rather than personal discomfort. The

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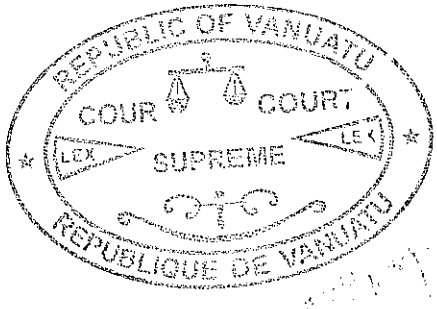
[8] *Sedleigh –Denfield V O'Callaghan*
[9] *Baylis v Lea* [1962] S.R.(N.S.W.) 521
[10] Salmond & Heuston Law of Torts (21st edn), p.74
[11] *Stone v Bolton* [1949] 1AllE.R. 237
[12] *St Helen's Smelting Co v Tipping* [(1865) 11H.L.C. 651
[13] *Sturges v Bridgman* (1879) 11 Ch.D. 852



difficulty comes mainly from looking at cases which only involve encroachment on or direct physical injury to neighbouring land. In the present case it is necessary to look at the "damage" caused by the nuisance complained of, the offensive smell, the noise and the polluted water. If St Helen's were to be taken literally one would have to look to the "cost" of the damage caused to property, the bricks and mortar. Later cases make it clear that when dealing in particular with smells or noxious fumes, cases which only involve interference with the enjoyment of one's property, there need not be a pecuniary loss but the damage does need to be material or substantial.[14] It is also accepted that the nuisance complained of "*need not be injurious to health although offensive to the senses*".[15] The law of nuisance has been effective in actions against defendants who have carried on offensive businesses such as prostitution and sex shops [16] from adjoining properties where there can have been no possibility of *material injury* to the property affected or injury to health. The rational and justification for such instances was best set out by Lord Hoffman when he emphasised that even in cases of nuisances of the *"personal discomfort variety the damages are awarded for the effect on the amenity value of the land."*[17]

8. As has been indicated earlier, the Claimant is saying the smell, the noise and pollution from the Defendants' business have created a nuisance affecting her property. There are numerous cases where the courts have accepted that smell and noise can be actionable nuisances but there must be evidence establishing such a state of affairs. It is not simply a question of proving that noise or smells emanate from the Defendants' land, the evidence must show, on the balance of probabilities, the noise, the smell and the pollution is an interference with the Claimant's enjoyment of her land. It has to be said in this case that the evidence in favour of the Claimant is rather overwhelming. It should be noted at this stage that only the first named defendant attended court and participated in the proceedings. Only he gave evidence. The Defendants have separated and apparently the second named defendant has no interest in this case. The first named defendant confirmed that his wife was aware of the proceedings. Reference to the Defendants is in reality only reference to the first named defendant. Nothing, at this stage, turns on that fact.

9. There is no doubt that both the Claimant and the Defendants have residential leases. A copy of the Defendants' lease is attached as an annexure ('C') to the Claimant's sworn statement. The restrictions (they are set out in the Schedule) are quite stringent and to mention just a few; the land is designated residential, no buildings or structures to be built without approval from the landlord, not to keep any livestock or animals (other than cats and dogs in reasonable numbers) and not to cause nuisance or annoyance to owners or occupiers of adjacent premises. There appears to be no dispute that the Claimant's lease has similar provisions.

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[14] *AG v Conduit Colliery Co* (1895) 1 QB 301

[15] *Malton Board of Health v Malton Manure Co* (1879) 4 Ex D 302; *Robinson v Kilvere* (1889) 41 Ch D 88; *Halsey v Esso Petroleum Co Ltd* [1961] 2 All E.R. 145

[16] *Thompson-Schwab v Costaki* [1956] 1W.L.R. 335; *Laws v Florinplace Ltd* [1981] 1All E.R. 659

[17] *Hunter v Canary Wharf Ltd* [1997] A.C. 655

10. The area surrounding both properties is undoubtedly rural. There is an indication in the evidence that all the land was originally a cattle ranch. However it is no longer a cattle ranch and the lessor's intentions in respect of the land are quite clear, the leases restrict use to residential purposes. The leases do not allow any other use. The Defendants' business sticks out like a sore thumb in this residential area. Whilst the Defendants are entitled to use their property for any purpose they wish, they must do so whilst bearing in mind that they have neighbours and they must do so bearing in mind the type of neighbourhood which they occupy.

11. The central issue is the reasonableness of the Defendants' behaviour in carrying out a business in the manner they have and in the place they have. The evidence shows the egg laying arm of the business involves some 10,000 egg laying chickens confined to cages in a building some 70 metres in length. There are approximately seven chickens to a cage. No precise measurements for the cages were mentioned but there are photographs which show they are not particularly generous in size. The evidence was that these chickens produced approximately two tons of faeces and other waste every two days or put another way, a ton a day. The Defendants admitted the waste smelt but did not think it was a nuisance. The laying chickens are fed at various times during the day and night. Sometimes they are fed at midnight. When they are being fed they are naturally awake. When they are awake they make noise. They also make a noise when they lay eggs. The Defendants did not think the noise was a nuisance. In addition there is another shed which contains a further 2,000 chickens. These are young chickens being brought on as layers. The existence of these chickens was only revealed in answer to a question from the bench following cross examination. No precise details were given about the quantities of waste from these chickens or the noise made by them or indeed anything much at all about them.

12. The evidence establishes, without question, that the Defendants are engaged in an intensive farming business. The number of chickens involved in the operation, the manner of their keeping and the limited area within which those chickens are housed can lead to no other conclusion. It is an intensive farming operation which is totally out of keeping with the rural residential character of the surrounding area.

13. The Defendants' evidence was that they aimed to remove the chicken waste from the property 2 or 3 times a week. Exactly how it was removed and how and where it was disposed of was unclear. Evidence was led of chicken waste being bagged and left to be taken away by others or of it being loaded onto a truck and disposed of. The evidence implied that it was left accumulating on the property for at least two days. The evidence from the Claimant and her witnesses was that the smell from the "chicken farm" was persistent foul and repulsive[18]; repugnant and unpleasant [19]; pungent and appalling [20]. Some of the witnesses are friends who visit from other areas of Port Vila and others are friends who visit but who live close by. Those who live in the area attest to the unpleasant smell affecting their own homes even though they live some distance away (up to a kilometre or more). Some of the visitors gave evidence about the smell

[18] Sworn statement of Ms Eloise Viart
[19] Sworn statements of Mr Jean-Christophe Poisson, Mr & Mrs Pechan, Ms Anne Naupa and Mr & Mrs Vascocellos
[20] Ms Marie Benoit; Mr & Mrs Todman and Ms Julie Saurwien

spoiling visits to their friend the Claimant causing them to leave early. The witnesses who attended court and gave evidence were unshaken in cross examination and confirmed how unpleasant they found the odour. Other witnesses were not challenged. The Claimant in her evidence told of not being able to sit in her garden and how she could not leave windows open at night. It is apparent from the evidence, and I so find, that there is a smell emanating from the Defendants' business which was and is offensive to the Claimant and her visitors and guests.

14. The witnesses for the Claimant have also attested to the increase in the level of noise which the business causes. The Claimant and her daughter both say the noise of the chickens is intolerable. In evidence the first named defendant confirmed that the chickens could be noisy at any time of the day and night. When the chickens were fed they were noisy. When they laid eggs they were noisy. There is no question noisy chickens can cause a nuisance [21] the only question is whether the undoubted noise from the Defendants' business is an interference with the Claimant's enjoyment of her property ? The evidence, including an actual audio recording, from the Claimant and her witnesses establishes without question that the noise from 12,000 chickens is intrusive and detracts from the Claimants enjoyment of her home.

15. However, that is not the only noise complained off. The Claimant says in evidence that there is a considerable amount of vehicular movement to and from the Defendants' property with people calling to buy eggs or collect chicken waste for manure or generally in connection with the business. There is also the noise of machinery and, in the past, a bulldozer or similar piece of plant used in construction. These have all added to the noise coming from the Defendants' property. All this noise is related to the Defendants' business.

16. The Claimant has produced evidence about the deteriorating quality of water from her bore. Whilst there is no direct evidence which conclusively shows that the deterioration has resulted from pollution coming from the Defendants' property or business there is sufficient correlation between the rate of deterioration and the growth and change in the nature of the Defendants' business to establish liability. On the balance of probabilities the source of the pollution is the Defendants' business.

17. The Defendant's business has grown from when first established. There is no doubt that from at least 2010 the Claimant has brought the situation to the notice various official bodies, the local authority Shefa Council and the national authority in the form of the Department of Environmental Protection and Conservation. She has made it known that the business was the source of offensive smells and excessive noise. Shefa Council have issued several stop notices. The first named defendant says he was not aware of one sent to him in 2010 but has seen others. He confirms a meeting with officials from Shefa Council in 2013. He acknowledged receipt of a notice from the Department of Environmental Protection and Conservation in January 2013. The Defendants are, of course, aware of these proceedings, commenced in 2012. The first named defendant did not deny receiving a letter from the Claimant in 2011 detailing her

[21] *Leeman v Montagu* [1936] 2 All E.R. 1677

complaints. The letter was a comprehensive account of the Claimants' grievances. Although written in French the first named defendant said in evidence he could understand French. In short, the Defendants have been aware of the Claimant's concerns and unhappiness for a number of years.

18. There was an implication in the first defendant's evidence that the lack of action on the part of both Shefa Council and the Department of Environmental Protection and Conservation gave credence to his claim the land was being used for a lawful business, that somehow the lack of action on their part justified the continuing operation of the business. A defence of that nature was raised in *Lyon & Sons v Gulliver*[22]. In that case the defence was the failure of the Police to prevent obstruction. The court held that it could be no defence to a claim in nuisance that others were at fault for not doing their duty.

19. The Defendants also referred to the Claimant's daughter's use of the land to carry out a business involving horses. There was a suggestion that adjoining land was used to keep 30 horses. There was also evidence that such use had ceased in 2011 when the business was sold and the horses moved off the land. In any event it is well established that it is no defence to a claim in nuisance that the Plaintiff or Claimant has himself committed a nuisance. It was so held in *Colchester Corporation v Brooke*[23] and that is still good law today. Thus, even if the use by the Claimant was continuing, that use would only be something to consider on the question of the reasonableness of the Defendants' conduct it would not be a defence as such. In this case the nature of activity previously carried out by the Claimant (or her daughter), running a number of horses on one hundred hectares of land [24], is totally different from the intensive farming carried out by the Defendants and would not affect her claim against the Defendants.

20. The first named defendant says in evidence that the custom owners of the land have given him permission to run his business from the property. He has not been able to provide one item of proof to support this. He says he was sent letters by the custom owners (who were his and the Claimant's lessors) but is unable to produce copies. He has had an abundance of time to remedy this defect, to ask the Custom owners to provide him with a copy. There was apparently a change of custom owners of the Defendants' property in 2010. The undisputed evidence is that at least one of the members of the custom owners' family is employed by the Defendants. Despite this they have not produced any evidence of permission to fundamentally depart from the terms of the lease. Even if that evidence were available it is doubtful it would have afforded the Defendants a defence. In some respects the custom owners are lucky that "proof" of this permission has not been produced because they could end up being liable for the Defendants' unlawful actions by reason of their permitting it.

21. The first named defendant argues that his business has not grown as alleged but has in fact shrunk. He initially said that he had five sheds. He later said there were

[22] *Lyon & Sons v Gulliver* [1914] 1Ch 631 CA
[23] *Colchester Corporation v Brooke* (1846) 7 QB 399
[24] Unchallenged evidence from Ms Eloise Viart and the Claimant.

probably six and finally he agreed there were seven. He initially said all the sheds had been replaced by one shed. This turned out not to be the case. I regret to say the first named defendant's evidence has to be treated with scepticism. The number of sheds may have been reduced but the business has not got any smaller. The first named defendant's one shed turned out to be two. His maximum of ten thousand chickens turned out to be at least twelve thousand chickens. In truth it has been established, on the balance of probabilities, the business has increased in size and certainly in intensity.

22. Given the location of the Claimant's home, a rural but nonetheless residential area, she is entitled to be able enjoy her home free from interference by noxious odours, noise and pollution created by a business which involves intensive farming methods. A use of the land which is alien to the use of the surrounding land. The Defendants' have deliberately set about creating a business which consists of intensive farming, egg laying chickens organised on an industrial scale.

23. There is the question of the timeline involved. When did the Defendants' business start and when did the Claimant acquire her land ? There is some uncertainty about the answers to those questions. The uncertainty matters little in this case. In *Bliss v Hall* [25] and *Miller v Jackson* [26] the court held that the plaintiff coming to a nuisance was no defence. In *Bliss v Hall* the plaintiff bought a house close to a tallow-chandlery which had been set up 3 years previously. The tallow-chandlery emitted *"divers noisome, noxious and offensive vapours"*. However the court said that the plaintiff *"came to the house ....with all the rights which the common law affords and one of them is the right to wholesome air."* It did not matter in that case and it does not matter in this whether the Claimant acquired her property before or after the Defendants or when they started their business. As indicated earlier the nature of the locality is of great importance and there is no doubt that that part of Mele Bay is (and was) a peaceful rural residential area. Sadly that is no more. The Defendants' industrial farming activities have resulted in a gross intrusion of the Claimant's right to enjoy her home in the physical sense and a substantial interference with her lawful right to enjoy her home in a legal sense. The Defendants are liable to the Claimant in nuisance.

24. The Claimants also claim trespass. That claim was not pursued and has not been made out. The only possible trespass was of the type detailed in the leading case known as *Rylands v Fletcher.* This is often referred to as an escape of dangerous things. The only aspect of this case which comes anywhere close to such a situation is the instance described in evidence when there was a flood of mud, waste from the chicken farm and other debris onto the Claimants land. Given that the Rule in *Rylands v Fletcher* is now regarded as being a one which creates, in certain circumstances, strict liability in nuisance; this would not help the Claimant in her claim in trespass.

25. As regards nuisance I have found the Defendants are liable to the Claimant for the nuisance they have committed and the Claimant is entitled to relief. She asks the court for an order prohibiting the Defendants from continuing to run the business which

[25] *Bliss v Hall* (1838) 4 Bing N.C. 183
[26] *Miller v Jackson* [1977] QB 966

has caused the nuisance. Generally speaking, if a claimant or plaintiff has shown that there has been substantial interference with his or her enjoyment of land and that it is continuing or likely to recur the claimant or plaintiff is prima facie entitled to an injunction. Indeed it was held in *Kennaway v Thompson* [27] that in such a case the burden would be on a defendant to show special circumstances why an injunction should not be granted. It is open to the court to award equitable damages in lieu of an injunction but the general rule is that:

> *"In cases of continuing actionable nuisances, such jurisdiction* (the jurisdiction or authority to order payment of equitable damages) *ought not to be exercised except under very exceptional circumstances"* [28]

The court in *Shelfer* could see no good reason why any public benefit conferred by the defendant's behaviour should or could be taken into account in exercising the jurisdiction to grant an injunction. There is no reason why a prohibitory order should not be made in this case.

26. The Claimant is also seeking damages. She is entitled to be compensated for the depreciation in the amenity value of her property during the period for which the nuisance persisted (or persists). Lord Hoffman in *Hunter v Canary Wharf Ltd* [29]was of the view that:

> *"To some extent this involves placing a value on intangibles. But estate agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case*"

In cases of this type a measure has been applied which has been linked to the reduction in the market rental value of the property whilst the nuisance persisted. This has been so in the English courts [30] and those in other Commonwealth jurisdictions such as New Zealand [31]. The New Zealand case carried a caveat to the effect that the general obligation on the claimant to mitigate loss requires the claimant who claims an interference with *"comfort and convenience"* to act reasonably promptly to secure an injunction. There is no question that requirement is satisfied in the present case.

27. The Claimant moved onto the property in 2010. No exact date was given but the evidence establishes that it was around the middle of the year, probably in June. The Claimant's enjoyment of her property has been interfered with from that day on and is continuing.

28. The difficulty I face in assessing damages in this case is that the Claimant has produced a report and expert evidence [32] concerning the value (or lost value) of the

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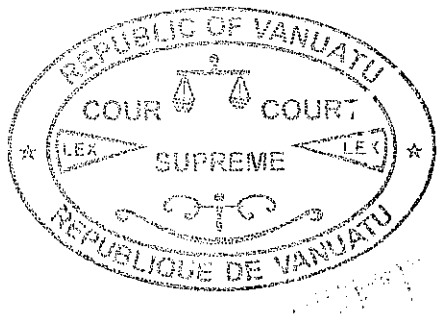
[27] *Kennaway v Thompson* [1981] QB 88
[28] *Shelfer v City of London Electric Lighting Co* [1895] 1Ch 287
[29] *Hunter v Canary Wharf Ltd* [1997] AC 655
[30] *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1
[31] *Hawkes Bay Protein Ltd v Davidson* [2003] 1 NZLR 536
[32] Sworn statement and evidence from Levi Tarosa



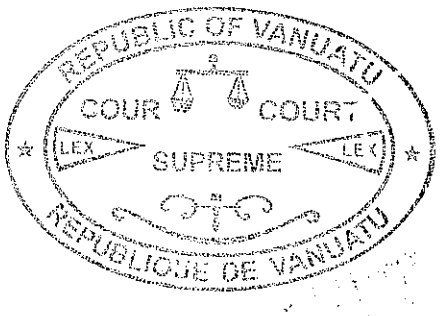
land. That is not what is in issue in this case. The damage caused to the land is minimal and moreover is not permanent. The pertinent damage is that to the amenity value of the Claimant's land. That will not be permanent. The damage will cease when the activities complained of cease. That will be the effect of any prohibitory order or injunction. What needs to be calculated is an amount sufficient to compensate the Claimant for the damage to the amenity value of her land from June 2010 until such time as all offensive activity comes to an end. Unfortunately Mr Tarosa's calculations do not greatly assist in that exercise. We do know from his report that the "Highest and Best Use" of the Claimant's land would be agricultural. From page 7 of Mr Tarosa's report it would seem the value of the land as agricultural land would be 5% more that as residential. It can also be seen from page 3 that the only "facility of special interest" that enhances the value of the land is its closeness to the beach at Mele Bay. Taken together they would indicate the Claimant would have to expect some impact from agricultural activities in the surrounding area and that the amenity value would unlikely be affected to any great extent by such activity. However, the Defendants' business goes well beyond ordinary agriculture in the area and clearly has affected the Claimant's enjoyment of the land in both a legal sense and a practical sense. Amenity value is the "intangible" referred to by Lord Hoffman.[33]

29. It is probably difficult to tie down what is meant by amenity value as it will vary from person to person and place to place. It could be the *"pleasant circumstances and advantages"* (meaning wide streets and plenty of air and room between houses) described in *Re Ellis and Ruislip Northwood UDC*[34] or the environment as seen in the South Australian Environmental Protection Act 1993. A dip into Black's Law Dictionary reveals A*menity*; *"(Latin amoenitas, pleasantness). Something tangible or intangible that increases the enjoyment of real property such as locality, view, landscaping, security or access to recreational facilities*". From the evidence of the Claimant a fair idea can be gleaned of what she would think of as the amenity value of her property. She spoke of her paradise home and of course her complaints relate mainly to noise and smells. What I am unable to ascertain with any degree of exactitude from her evidence is what value she would place on those elements of life.

30. In all the circumstances and bearing in mind the value of the Claimant's property I will award her a total of 10 million Vatu for the loss of her peace and quiet, her fresh air, the general ambience of rural residential living and the "je ne sais quoi" attributable to living in that locality without a chicken farm on your doorstep.

31. For the reasons set out above the Claimant is not entitled to damages for the diminution in the value of her land as claimed. Nor is the Claimant entitled to damages for the "loss of opportunity". In *McRae v. Commonwealth Disposals Commission* [35] relying on rumours, the Commission sold to McRae the right to salvage an oil tanker thought to be marooned at the specified location. Unfortunately, the tanker did not exist. The Commission argued the contract was void because of a common mistake as to the

[33] See paragraph 26 above.
[34] Re *Ellis and Ruislip Northwood UDC* [1920] 1 K.P. 343
[35] *McRae v. Commonwealth Disposals Commission* (1951) 84 CLR 377



existence of the subject matter, but the court noted that the Commission "*took no steps to verify what they were asserting and any 'mistake' that existed was induced by their own culpable conduct.*" McRae wasted money searching for the non-existent wreck. His claim for the loss of profits expected from a successful salvage was dismissed as too speculative. That was in contract. In tort the purpose of damages is to put the Claimant in the position they would have been in had the tort not been committed. There is a difference seen in negligence cases and other causes of action. There is also a difference in jurisdictional approaches. In England and Wales the House of Lords in *Hotson v East Berkshire Area Health Authority*[36] held that the question to be decided was whether the cause of the injury was the fall or the health authority's negligence in delaying treatment, since if the fall had caused the injury the negligence of the authority was irrelevant in regard to the plaintiff's disability. Because the judge had held that on the balance of probabilities, even correct diagnosis and treatment would not have prevented the disability from occurring, it followed that the plaintiff had failed on the issue of causation. This approach was followed in the more recent case of *Gregg v Scott* [37]. In Australia claims for loss of chance have been succeeded in medical negligence cases [38]. In nuisance I prefer the English approach based on causation.

32. The Claimant also seeks exemplary damages. Exemplary damages are intended to do more than just compensate a claimant for his loss. They are intended to punish the defendant. The issue of exemplary or punitive damages has had a somewhat chequered history in English common law. At its root is the well known and often quoted case of *Rookes v Barnard [1964] AC 1129.* Later came the case of *Cassell & Co Ltd v Broome [1972] AC 1027 (HL)* which approved the findings of the court in *Rookes v Barnard.* However it was in the first mentioned case that Lord Devlin formulated the 3 categories of cases where and only where exemplary damages might be appropriate. First was a situation where there had been oppressive, arbitrary or unconstitutional action by servants of the Government; second was where the conduct of the defendant was calculated by him to make a profit which may well exceed any compensation awarded by a court; and third was where there was express legislative authorisation. Lord Devlin was of the view that exemplary damages were in principle objectionable because they appeared to confuse the criminal and civil functions of the law. His restrictive view has not been followed in Australia[39] or in New Zealand [40]. In this jurisdiction the restrictive view has been followed in several cases [41]. In the circumstances it will be necessary to find that the Defendants' conduct in this case falls into the second category as set out by Lord Devlin, namely that they set out on a deliberate course of action based purely on a profit motive and calculating that any compensation they might be required to pay would be exceeded by their profit. It is

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[36] *Hotson v East Berkshire Area Health Authority* [1987] 2 All ER 909
[37] *Gregg v Scott* [2005] UKHL 2
[38] *Rufo v Hosking* (2004) NSWCA 391
[39] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 (HCA)
[40] Taylor v Beere [1982] 1 NZLR 81 (CA)
[41] *Harrisen v Holloway No 1* [1984] VUSC 8; [1980-1994] Van LR 106 (22 August 1984); confirmed on appeal in Harrisen v Holloway No 2 [1984] VUCA 7; [1980-1994] Van LR 147 (14 December 1984); Tahi v Kwemoli [2001] VUSC 91; Civil Appeal Case 002 of 2001 (10 August 2001) and Michel v Government of the Republic of Vanuatu [2003] VUSC 133; Civil Case 27 of 2000 (14 April 2003)

important to note that it is not the making of a profit which is crucial it is the defendant's purpose or reason.

33. It is therefore possible that even in a case where the defendant proves to be inept in his calculations and actions and makes no profit at all, if he is found to have behaved in a calculated and deliberate manner he may still be required to pay exemplary damages [42].The evidence in this case shows that the Defendants acted in a deliberate and calculating fashion. They ignored Stop Notices from Shefa Council, letters from the Claimant and others, visits from Shefa Council, a Stop Notice from Department of Environmental Protection and Conservation and finally the issue of proceedings. It was suggested at times the first named defendant was someone who simply stuck his head in the sand but in my view the evidence shows more than that. The evidence shows that the Defendants, mainly it must be said, through the actions of the first named defendant; fall squarely into the second category of defendants described by Lord Devlin. The Defendants shall be ordered to pay exemplary damages of 1 million Vatu.

34. As is usual costs will follow the event and the Defendants shall pay the Claimant's costs, such costs to be taxed if not agreed.

35. On the question of costs and before leaving this matter I wish to comment on one aspect of the case which caused me concern. During the proceedings I queried with Mr Thornburgh whether it was proper for him to have administered the oaths on his client's sworn statements. He informed the court that it was common practice. If it is common practice it now ought to cease and cease for these reasons. The "old" Rules, the Western Pacific High Court (Civil Procedure) Rules, 1964 at Rule 40 specifically forbade the "*advocate acting for the party on whose behalf the affidavit is to be used* " or his "*clerk or partner*" from administering oaths. The Rule was based on the "old" R.S.C. O. 38, rr. 16 and 17. If an advocate acted in breach of those rules then the affidavit could not be admitted as evidence. Of course under the "new" Rules, the Civil Procedure Rules 2002 (and specifically Rules 18.6 and 1.7) the old rules no longer apply. There is no similar provision relating to oaths in the new rules. However, that is not an end to it. Lawyers who practice in Vanuatu are subject to the Rules of Etiquette and Conduct of Legal Practitioners Order No. 106 of 2011 made under the Legal Practitioners Act [Cap 119]. Practitioners should therefore have regard to Clauses 30 and 78 of those Rules.

> *30 (2) A lawyer must not administer an oath or take a declaration in any case where the lawyer lacks or may appear to lack the necessary independence*
>
> *78 (1) A lawyer engaged in litigation for a client must maintain his or her independence at all times.*

Given the way sworn evidence is now admitted automatically as evidence in chief in civil proceedings there is very good reason why these provisions should be stringently observed. This is so if not for the protection of the client then for the protection of the

[42] *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324 (Ch)

lawyer. The consequences of not complying with the requirements of the Rules of Etiquette and Conduct could be severe and probably at the very least could affect costs recovered in a successful case. Mr Thornburgh explained that he could wear two hats, one as a Legal Practitioner here in Vanuatu, the other as an Australian lawyer. That cannot be and is not the case. When engaged in the law in Vanuatu he is a Legal Practitioner admitted here and subject to the laws in this jurisdiction. If he is not properly admired here then he would be practicing illegally.

36. Returning to the case, with both a money order and a non-money order having been made in these proceedings it is necessary to turn to Rules 14.3. and 14.37 [43]. I anticipate that some time will be needed by all parties to consider their position following this decision. In the circumstances I shall not fix an enforcement conference immediately. I shall allow the parties some time for negotiations and allow them the option of seeking an adjournment of the Enforcement conference if all issues can be resolved by negotiation. I will diarise this case so that an Enforcement conference can be considered after the time allowed in the prohibitory order has expired. It will also be noted that I have given the parties liberty to apply should there be any applications needed to clarify or modify the order made or any part of it.

ORDER

I) The Defendants shall, within 3 months of this order, cease all business activities on their property (leasehold title 12/0822/071) and shall remove all equipment and birds and other animals and livestock used by and/or associated with the firm or business of Golden Eggs Natural Products or any similar or other commercial concern operated by them on their property;

II) The Defendants shall forthwith pay damages to the Claimant in respect of their unlawful interference with her enjoyment of her property in the sum of 10 million Vatu;

III) The Defendants shall forthwith pay exemplary damages to the Claimant of 1 million Vatu;

IV) The Defendants shall pay the Claimants costs, such costs to be taxed if not agreed;

V) Liberty to apply on 2 days written notice.

DATED at Port Vila this 1st day of July 2015.

BY THE COURT

CHETWYND J

REPUBLIC OF VANUATU COUR COURT SUPREME LEX LEX REPUBLIQUE DE VANUATU

[43] Civil Procedure Rules 2002