



[2024] JMSC Civ 65

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO.SU2022CV00501

BETWEEN	MONICA WALKER	1 st CLAIMANT
AND	PROPRIETORS STRATA PLAN No 42	2 nd CLAIMANT
AND	HEATHER NASRALLA	1 st DEFENDANT
AND	WAYNE NASRALLA	2 nd DEFENDANT
AND	EDITH REARDON	3 rd DEFENDANT
AND	GRACE DONALDSON SHAW	4 th DEFENDANT

Miss Gillian Mullings instructed by Naylor & Mullings for the claimants

Mr Conrad George and Miss Gabrielle Chin instructed by Hart Muirhead Fatta for the 1st and 2nd defendants

Heard : December 1, 2023, January 12, 2024 and May 31, 2024

*Nuisance - Interim -injunction - Whether the exemptions allowing a private law to claim to enforce the Noise Abatement Act have been met
Whether the requirement to bring a claim in public nuisance exists -
Whether serious issues to be tried with respect to private nuisance-
Whether damages would be an adequate remedy.*

IN CHAMBERS

CORAM: JARRETT, J

Introduction

[1] Monica Walker (“the 1st claimant”) owns and occupies strata lot 26 part of 11 Haining Road, Kingston 5. Proprietors Strata Plan No.42 (“the 2nd claimant”) manages the common property held by the strata proprietors in a development located at 11 Haining Road. Before me is their 2nd Further Amended Notice of Application for Court Orders filed on July 20, 2023 (“the application”), in which the 1st claimant seeks against Heather Nasralla McKay (“the 1st defendant”) and her brother Wayne Nasralla (“the 2nd defendant”), occupiers of the adjoining land at 9 Haining Road, Kingston 5, interim injunctive relief pending trial, for interfering with her quiet enjoyment of strata lot 26. The claimants allege that the 1st and 2nd defendants operate a restaurant by the name of ‘Coppers’ on the premises at 9 Haining Road. In the main, the underlying claim is brought in private and public nuisance and for alleged breaches of the Noise Abatement Act. The claim against the 3rd and 4th defendants, who are the owners of 9 Haining Road is seemingly not being pursued, as it does not appear that they have been served with any of the papers in this matter. The procedural history has been long. It is important that I first set out that history before reviewing the application, the evidence in support of the application and the relevant aspects of the pleadings.

Procedural history

[2] On November 22, 2022, the application then before me was primarily framed in terms of an alleged breach by the 1st and 2nd defendants of a restrictive covenant which prevented the use of 9 Haining Road, for other than residential purposes. I upheld a preliminary point made by the 1st and 2nd defendants that the 1st claimant could not enforce the restrictive covenant in issue as there was no evidence that the benefit of the restrictive covenant had been assigned to her, that it had been annexed to her lot or that her lot formed part of a scheme of development with reciprocal rights and obligations. My decision to remove the 2nd claimant from the

claim on the basis that it had no standing to bring it was set aside by the court of appeal¹.

- [3] On November 8, 2023, I made orders to restore the 2nd claimant to the claim, in compliance with the decision of the court of appeal, and in relation to additional preliminary points raised by the 1st and 2nd defendants. Of relevance to the current application are orders (5) and (6) below, which were part of the orders I made on November 8, 2023, concerning whether the 1st claimant could bring a private right of action alleging a breach of the Noise Abatement Act and whether she could bring a claim in public nuisance without the involvement of the Attorney General:-

“(5). In the August 17, 2023, amended claim, the 1st claimant alleges in summary that the 1st and 2nd defendants are liable in public nuisance as the noise emanating from their business operations at 9 Haining Road, has caused her to suffer significant damage over and above that suffered by the community and the general public. She also alleges that the 1st and 2nd defendants are not in compliance with the Noise Abatement Act. A breach of the Noise Abatement Act amounts to a criminal offence. The **House of Lords in Lonrho Ltd v Shell Petroleum(No 2) [1982] A.C.173**, held that where the only manner of enforcement created by statute is criminal prosecution, performance cannot be enforced in any other way, except : i) where on a true construction of the statute the prohibition was imposed for the protection of a particular class of individuals and the person seeking to enforce the prohibition falls within that class; and ii) where the statute creates a public right and individual members of the public suffer particular, direct, substantial damage, other and different from that which was common to all the rest of the public. The court

¹ Monica Monique Walker and Proprietors Strata Plan No.42 v Heather Nasralla McKay, Wayne Nasralla , Edith Reardon and Grace Donaldson Shaw [2023]JMCA Civ 46.

therefore has the jurisdiction to grant interim injunctive relief, where there is evidence placing a claimant within any of these two exceptions. In relation to the claim in public nuisance, case law is clear that a claimant is entitled to bring a claim in public nuisance without the Attorney General's consent, if it is shown that the claimant has suffered damage above that suffered by the public in general (See for example **Annette Nelson and Luselda Brown v Glasspole Murray [2012]JMSC Civ 76**).

(6) . Whether or not the 1st claimant's evidence supports the allegation that she falls within the second exception referred to in **Lonrho Ltd v Shell Petroleum(No 2) [1982] A.C. 173**, or her allegation in support of her claim in public nuisance, are issues to be determined on the hearing of the application for interim injunction. In the result, preliminary points 3 and 4 are therefore without merit.”

- [4] On November 9, 2023, the claimants filed a 2nd Further Amended Claim Form and 2nd Further Amended Particulars of Claim. In these amended pleadings, they have substantially amended the averments in relation to the claim in public and private nuisance and the alleged breach of the Noise Abatement Act.

The claim

- [5] The pertinent allegations against the 1st and 2nd defendants are that their business regularly hosts large gatherings which give rise to loud noise travelling more than 100 feet from 9 Haining Road, caused by their patrons talking, shouting and screaming. There is the improper disposal of waste by burning against the boundary wall and this results in smoke pollution. Alarms installed by the 1st and 2nd defendants regularly go off throughout the day and the night and there is noise from drilling and construction work taking place on the premises. It is also alleged that the 1st and 2nd defendants have breached the Noise Abatement Act by

operating loudspeakers and other sound amplification devices exceeding the maximum of 55 decibels between the hours of 7:01 am and 9:59 pm daily, and 50 decibels between the hours of 10 pm and 7 am nightly. The averments state that all these actions, interfere with the 1st claimant's quiet enjoyment of her lot and that she has suffered consequently.

[6] With respect to the claim in public nuisance, the claimants allege that the actions of the 1st and 2nd defendants cause the 1st claimant unreasonable and substantial danger to her property and her health. It is pleaded that the entire Haining Road community is affected by the conduct of the 1st and 2nd defendants and the 1st claimant has suffered damage which is: "significantly over and above" that suffered by the community and the general public.

[7] It is also pleaded that the 1st and 2nd defendants have placed a camera in the direction of 11 Haining Road, to record and monitor activities in the common areas, and this is a breach of the 1st claimant's constitutional right to privacy under section 13(3)(j) of the Constitution.

[8] The remedies which are being sought by the 1st claimant and which are relevant to the application before me are : -

1. "A declaration that the Defendants and/or its (sic) agents by their actions detailed herein have interfered with the First Claimant's quiet enjoyment of her land.
2. An injunction to restrain the Defendants and/or its (sic) agents operating/managing their businesses in a manner that creates nuisance by interfering with the quiet enjoyment of adjoining land at 11 Haining Road, Kingston 5 in the parish of St. Andrew to wit:
 - a) To cease and desist from playing loud music on the subject premises.

- b) Hosting large gatherings occasioning loud noises travelling distances of more than one hundred (100) meters outward from their premises
 - c) Improperly disposing of waste by burning same against the wall the 2nd Claimants are responsible for maintaining.
 - d) To remove the security cameras on the subject property, that are positioned to view the First Claimant's premises and common areas and/or in the alternative be repositioned to prevent the recording and monitoring of the common areas on the Claimants' premises at 11 Haining Road, Kingston 5 in the parish of St. Andrew.
 - e) To restrain the Defendants' operation of loudspeakers and other sound amplification devices, by themselves or their agents, at 9 Haining Road, Kingston 5 in the parish of Saint Andrew from exceeding a maximum of 55 decibels (dBA) between the hours of 7:01 A.M. and 9:59 P.M. daily and 50 decibels (dBA) between the hours of 10:00 P.M. and 7:00 A.M. nightly.
3. An order that the Defendant (sic) remove and/or destroy the wooden structure affixed to the adjoining boundary wall between the subject property and the parcel of land known as 11 Haining Road, Kingston 5 in the parish of Saint Andrew which exists in breach of the restrictive covenants registered on (sic).
4. A Declaration that the Defendants and/or its (sic) agents have infringed on the constitutional rights of the Claimants embedded in Section 13(3)(j) of the Charter of Fundamental Rights and Freedoms by the installation of security cameras on the subject property that are so positioned to record the private residences of the 2nd Claimant.

5. Special Damages in the sum of \$1,000,000.00.
6. Damages for breach of public and private nuisance, damages for negligence, damage to the Claimant's quiet enjoyment of their property, property rights and constitutional right to privacy."

[9] In relation to the 2nd claimant, the remedies are:-

1. "An injunction to restrain the Defendants and/or its (sic) agents operating/managing their businesses in a manner that creates nuisance by interfering with the quiet enjoyment of adjoining land at 11 Haining Road, Kingston 5 in the parish of St. Andrew to wit:
 - a) Improperly disposing of waste by burning same against the wall the 2nd Claimants are responsible for maintaining.
 - b) Placing any structures on the boundary wall of 11 Haining Road, Kingston 5 in the parish of St. Andrew without the consent of the 2nd Claimant."

The application

[10] I turn now to the application. In it, the claimants ask that I make the following interim orders: -

1. "An injunction to restrain the Defendants whether by themselves and/or their agents or otherwise howsoever from:
 - a) Playing amplified music at high volumes on the premises known as 9 Haining Road, Kingston 5 in the parish of St. Andrew with Certificate of Title registered at Volume 283 Folio 62 (their premises) in the Register Book of Titles travelling distances of

more than One hundred (100) metres outward from all that parcel of land.

b) Hosting gatherings occasioning loud human noise (including but not limited to talking, shouting, clapping and screaming) travelling distances of more than one hundred (100) meters outward from their premises.

c) Disposing of waste by burning same against the wall of 11 Haining Road, Kingston 5 in the parish of Saint Andrew.

2. A mandatory injunction requiring the removal of the security cameras placed by the 1st Defendant on the premises of 11 Haining Road and common areas and/or in the alternative to be repositioned to prevent the recording and monitoring of the common areas of the Claimant's premises at 11 Haining Road, Kingston 5 in the parish of Saint Andrew.
3. To restrain the defendant's operation of loudspeakers and other sound amplification devices, by themselves or their agents, at 9 Haining Road, Kingston 5 in the parish of Saint Andrew from exceeding a maximum of 55 decibels (dBA) between the hours of 7:01 A.M. and 9:59 P.M. daily and 50 decibels (dBA) between the hours of 10:00 P.M. and 7:00 A.M. nightly".

[11] Eight affidavits were sworn by the 1st claimant in support. ² Below is a summary of the relevant evidence culled from them³: -

- a) The 1st and 2nd defendants use of 9 Haining Road interferes with her rights by their contravention of the Noise Abatement Act. They operate their sound amplification devices and speakers in a manner that consistently interferes with her quiet enjoyment of her premises. The decibel levels exceed the legal limit between 11pm and 4 am and the noise pollution thereby created, cause her to lose sleep and rental income. It has also depreciated the value of her property and caused decreased levels of productivity and emotional aggravation.
- b) Despite reports to the Jamaica Constabulary Force the police have failed to enforce the Noise Abatement Act.
- c) Around October 2021, the 1st and 2nd defendants began to plague the claimants with construction noises which went beyond 5pm and began before 9 am.
- d) The business operated by the 1st and 2nd defendants plays very loud music at all hours of the day and night. There are also loud human noises, and blaring alarms going off during the day and at nights but particularly in the early morning hours. This makes it difficult to hear anything, to focus or to take phone calls.

² Affidavit of Monica Monique Walker filed on February 17, 2022; Supplemental Affidavit of Monica Monique Walker filed February 17, 2022, Further Affidavit of Monica Monique Walker filed August 17, 2022; 4th Affidavit of Monica Monique Walker filed September 16, 2022; 5th Affidavit of Monica Monique Walker filed October 5, 2022; 6th Affidavit of Monica Monique Walker filed April 28, 2023 , 7th Affidavit of Monica Monique Walker filed May 15, 2023 and 8th Affidavit of Monica Monique Walker filed July 20, 2023.

³ I had no regard to the video recordings exhibited to the affidavit of the 1st claimant filed on May 15, 2023, as I agree with the objections made by Mr George that they have not been authenticated.

- e) The business operated by the 1st and 2nd defendants hosts large gatherings which cause a great deal of noise which travel distances of more than 100 feet.
- f) The 1st and 2nd defendants improperly dispose of waste by burning it against the claimants' wall, thereby creating foul-smelling smoke.
- g) The 1st and 2nd defendants have installed cameras positioned to record the common areas at 11 Haining Road.
- h) Because of the 1st and 2nd defendants' actions, she has suffered stress, discomfort, emotional aggravation and invaluable loss and damage.
- i) She denies the allegations made against her in the defence and by the 1st defendant and gives an undertaking as to damages. She discloses that she has realty sufficient to support that undertaking and exhibits a certificate of title for property in Manchester which is owed solely by her since the death of the other joint tenant.

[12] Reliance is also placed on affidavits filed by other registered proprietors and/or occupiers of strata lots located on 11 Haining Road. Their evidence is that: -

- a) The 1st and 2nd defendants' current use of 9 Haining Road creates noise as they play music at loud volumes throughout the evening and into the night and their patrons create loud disturbances.⁴
- b) The restaurant operated by the 1st and 2nd defendants produce very high noise levels which cause grave disturbance to the quiet enjoyment of property. The noise prevents sleep at nights, this impacts productivity levels. The high volume of music and the

⁴ Affidavit of Janet Chen filed February 28, 2022

shouting from the patrons have caused the inability to watch television, listen to the radio or use the telephone. ⁵

- c) The 1st and 2nd defendants' current use of 9 Haining Road creates noise by way of loud and boisterous music with expletives played at insufferable volumes throughout the evenings and into the nights. The loud disturbances created by their patrons' screams and shouts affect the ability of tenants of lot 25 to enjoy the lot.⁶
- d) Since October 2021, the defendants use of 9 Haining Road has caused excessive loud noises at insufferable volumes in various forms such as loud music with expletives, patrons screaming and shouting into the evenings beyond curfew. The 1st and 2nd defendants have caused air pollution from the frequent burning of garbage along the boundary wall. The noise interferes with peace of mind and the ability to sleep and rest. ⁷
- e) After the construction noises which seemingly ceased in October 2021, the 1st and 2nd defendant's current use of 9 Haining Road as a restaurant and lounge has created noise as loud music is played throughout the evenings. Their patrons create loud disturbances for the neighbouring community and particularly 11 Haining Road. ⁸

The defence and counterclaim and the evidence in response to the application

[13] In their defence, the 1st and 2nd defendants say that for over twenty five years, the 1st defendant operated a restaurant known as "Heather's Garden Restaurant" with the permission of the owners of the land. It is denied that construction noise in

⁵ Affidavit of Una Miller filed February 28, 2022

⁶ Affidavit of Joan Coore filed February 28, 2022.

⁷ Affidavit of Steven Chung filed February 28, 2022.

⁸ Affidavit of Tanya Francis filed February 17, 2022.

October 2021 occurred as alleged by the claimants, and it is denied that there is any burning of waste on the property. It is pleaded that there is in operation on 9 Haining Road a high-quality restaurant and not an establishment where loud music is played, and no loud parties are held there. The loss and damage allegedly suffered by the claimants is therefore denied. It is averred that the cameras were installed due to a directive from the 1st defendant's insurers arising from the conduct of the 1st claimant. It is alleged that the 1st claimant has thrown a glass bottle containing bleach from a balcony on 11 Haining Road which hit the 1st defendant in her back, during a baby shower taking place at the establishment. At another time, she assaulted the then Commissioner of Police by hurling a bottle which hit him. She has also stoned an electrician and threatened to burn down the establishment.

- [14]** The 1st and 2nd defendants counterclaim against the 1st claimant for damages for trespass, damages for nuisance for the cost of installing security equipment and a permanent injunction retraining her from further trespass.
- [15]** Five affidavits in response to the application were all sworn by the 1st defendant.⁹ Her evidence is that she is a restaurateur and a commercial airline captain. She operated the restaurant known as "Heather's Garden Restaurant" between 1987 and 2019 on 9 Haining Road. She denies that the construction works were done without due consideration for the claimants. According to her, the complaints about noise emanating from her establishment are not factually based. She says there is no loud noise created by the restaurant; its patrons do not make significant noise and certainly no noise that would travel any appreciable distance let alone 100 feet; the restaurant is a refined place aimed at providing a first-class dining experience ; and there is no improper disposal of waste or burning of same along

⁹ Affidavit of Heather McKay filed on July 13, 2022; Second Affidavit of Heather McKay filed July 13, 2022; Third Affidavit of Heather McKay filed August 24, 2022; Fourth Affidavit of Heather McKay filed September 30, 2022 and Fifth Affidavit of Heather McKay file September 30, 2022.

the boundary wall. The 1st defendant also says that the police have come to her establishment no less than five times and have had no issue with the Noise Abatement Act. She says that it is the 1st claimant who has been a nuisance for over twenty-five years, and she repeats the allegations in the defence with respect to her throwing bottles and stones onto 9 Haining Road. She alleges further that it is the 1st claimant's behaviour that led to the instructions from her insurers for the installation of security cameras.

[16] As to the 1st claimant's undertaking as to damages, the 1st defendant says that the earnings of the restaurant for the first three months of 2022 were \$10,900,689.89, and she has been advised by her attorneys-at-law that this has implications for the 1st claimant's cross undertaking as to damages. According to her, the property the 1st claimant has is less than 1/3 of an acre and located in rural Manchester , and is insufficient to compensate for the losses the restaurant would incur as a consequence of the business being destroyed.

Analysis and discussion

[17] In determining this application, I must first be satisfied that there are serious issues to be tried. If I am so satisfied, then I must go on to consider whether damages would be an adequate remedy for the claimant. If damages would be an adequate remedy, then I ought to refuse injunctive relief. If, however damages would not be an inadequate remedy, I will need to consider whether the undertaking as to damages given by the 1st claimant, would protect the 1st and 2nd defendants if it turns out at trial that the injunction ought not to have been granted. It is where there

is uncertainty with respect to these matters that I must consider the balance of convenience or the justice of the case.¹⁰

Are there serious issues to be tried.

[18] The claim is based in both private and public nuisance. It also claims breaches of the Noise Abatement Act and seeks remedies in relation to those alleged breaches. If there is any doubt about this, the affidavit of the 1st claimant filed on July 11, 2022, makes it clear. She says in that affidavit that the decibel levels of the music emanating nightly from 9 Haining Road, exceed the legal limit, and because the police have failed to deal with this criminal offence, the court's assistance is being sought to enforce the Act. In paragraph 16(a) of the 2nd Amended Particulars of Claim, it is pleaded that the business on 9 Haining Road regularly utilizes loudspeakers at all hours of the day and night and that the music is most times in excess of the legal limits established under the Noise Abatement Act. Additionally, it is pleaded in paragraph 17(i), that one of the particulars of nuisance is noise pollution in breach of the Noise Abatement Act. Miss Gillian Mullings, counsel for the claimants, submitted that only the injunctive relief seeking to retrain the defendants from operating loudspeakers exceeding a maximum of 55 decibels between the hours of 7.01am and 9.59pm daily and 50 decibels between the hours of 10pm and 7am nightly relate to the Noise Abatement Act. However, it seems to me that the interim relief seeking an injunction, restraining the defendants from playing amplified music at high volumes from 9 Haining Road and travelling distances of 100 metres outwards, is clearly related to section 3(1)(b) of the Noise Abatement Act. That section prohibits persons from operating or permitting or cause to be operated any loudspeaker, microphone or any other device for the amplification of sound in such a manner that the sound is audible

¹⁰ American Cyanamid Co. v Ethicon Ltd. [1975] UKHL 1 ; National Commercial Bank v Olint Corporation [2009] 1 WLR1405.

beyond a distance of 100 metres from the source of the sound and is reasonably capable of causing annoyance to persons in the vicinity.

[19] As observed earlier in this judgment¹¹, in my orders made on November 8, 2023, I stated that whether the 1st claimant's evidence supports the allegation that she falls within the second exception referred to in **Lonrho Ltd v Shell Petroleum (No 2)** (supra) or her allegation in support of her claim in public nuisance, are issues to be determined on the hearing of this application¹². To fall within the second exception in **Lonrho Ltd v Shell Petroleum (No 2)**, and thereby be entitled to bring a civil claim for a breach of the Noise Abatement Act which creates criminal offences only, the evidence of the 1st claimant must establish that due to the actions of the 1st defendant and 2nd defendants, she has suffered: "particular, direct and substantial damage other and different from that which was common to all the rest of the public". Her evidence before me is that the noise emanating from sound amplification devices used by the 1st defendant on 9 Haining Road, and the human noise of her patrons, cause her to lose sleep, makes it difficult for her to hear anything, to focus or to take phone calls; and cause her property to depreciate and to lose rental income. Most of the other affiants on whom the 1st claimant relies, also say that the alleged noise causes them to lose sleep and rental income, make it difficult to watch television or listen to the radio, and cause the depreciation of their properties. In my view there is no evidence from the 1st claimant which indicates that she has suffered substantial, direct and particular damage that is so different from others, to place her within the second exception in **Lonrho Ltd v Shell Petroleum (No 2)**.

[20] In relation to the claim in public nuisance, the 1st claimant's evidence also falls short. There is no evidence that she has suffered damage above that suffered by

¹¹ Paragraph 3

¹² The 1st exception in **Lonrho Limited v Shell Petroleum (supra)** clearly does not apply as on a true construction of the Noise Abatement Act it cannot be said that the prohibitions imposed were for the protection of a particular class of individuals.

the public, in order to allow her to bring a claim in public nuisance without the Attorney General's consent.¹³

[21] In the circumstances therefore, I find that there are no serious issues to be tried in relation to the 1st claimant's claim in public nuisance and for breaches of the Noise Abatement Act and therefore the remedies sought at paragraphs 1(a) and 3 of the application cannot be granted.

[22] With respect to the claim in private nuisance, counsel Mr George for the 1st and 2nd defendant argued that there is no evidence that his clients own or have legal control over the restaurant operated at 9 Haining Road, and there is no evidence linking the alleged noise emanating from the restaurant to either of them. The clear allegation from the evidence is that intolerable loud human noise emanating from the restaurant is caused by its patrons. While there is no evidence that the 1st or the 2nd defendant are the creators of the noise, it is pleaded in paragraph 6 of the defence¹⁴ that the 1st defendant and her agents operate a restaurant on the subject property, and it is a high-quality restaurant where no loud parties are held. The 1st defendant's own evidence is that she is a restaurateur, she gave instructions for the preparation of the pleadings, and she confirms the truth of the statements made in those pleadings¹⁵.

[23] The essence of liability in nuisance is the unreasonable interference with a person's interest in land. In **Coventry v Lawrence [2014] UKSC 13**, Lord Neuberger said in respect of the tort that:

“A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's

¹³ See order 6 made on November 8, 2023, quoted at paragraph 3 of this judgment .

¹⁴ Defence to Second Further Amended Particulars of Claim and Counterclaim filed November 17, 2023.

¹⁵ Affidavit of Heather McKay filed on July 13, 2022.

reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, "a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society".

- [24]** Case law has long established that the occupier of land is responsible for nuisance created on it where he knew or ought reasonably to have known of the nuisance but failed to take steps to rectify the unreasonable conduct.¹⁶ Based on the totality of the evidence in this case, it cannot be said that the 1st defendant was unaware of the allegations of the 1st claimant that intolerable noise made by the patrons of the restaurant is disturbing her quiet enjoyment of her property. The 1st defendant's position has been to deny the existence of any unreasonable or intolerable noise caused by her patrons. She says in paragraph 11 (d)(ii) of her affidavit filed on July 13, 2022, that the noise created by her patrons is not "significant". In paragraph 13 of that same affidavit, she says that the police have visited her establishment no less than five times since the restaurant was opened, as a result of complaints by the 1st claimant. It is plain, that whether or not the human noise created by the 1st defendant's patrons is such that it is substantial and unduly interferes with the 1st claimant's enjoyment of her land is a serious issue to be determined at trial. While I agree with Mr George that there is no evidence to link the 2nd defendant to the alleged nuisance, it certainly seems to me that based on the evidence, the 1st defendant is an appropriate person to be sued.
- [25]** While it is that the 1st defendant has denied that there is any burning of waste on 9 Haining Road, the evidence of the 1st claimant and several of the other affiants is that burning of waste by the boundary wall is in fact taking place and that the foul smell that emanates from that activity is also a disturbance to the 1st claimant and to them. On the pleadings and the evidence therefore, whether or not the

¹⁶ See for example *Sedleigh – Denfield v O'Callaghan* [1940]AC 880,

burning is taking place and amounts to a nuisance is in my view a serious issue to be tried in the claim.

- [26]** I likewise believe that there is a serious issue to be tried whether the positioning of the security cameras on the common areas of the 11 Haining Road, is a breach of the 1st claimant's constitutional right to privacy. Although the 1st defendant's evidence is that this was done at the directive of her insurers because of the conduct of the 1st claimant, the question arises as to whether the answer to the allegations against the 1st claimant is to position cameras to record and monitor private residential property.

The adequacy of damages

- [27]** Having found that there are serious issues to be tried in respect of the claim in private nuisance, I must now consider whether damages would adequately compensate the 1st claimant. Her evidence of sleep disturbance, stress, and emotional aggravation caused by the alleged noise, burning and breach of privacy are of significance. These are health related losses which, in my view, would not be adequately compensated by an award of damages, particularly in circumstances where the alleged nuisance is continuing.

- [28]** The 1st claimant has given an undertaking as to damages and has said that she owns property the value of which is sufficient to compensate the 1st defendant for any losses she may incur should it be determined at trial that the injunctions ought not to be granted¹⁷. The 1st defendant has disputed the adequacy of this cross undertaking as to damages given the earnings of the restaurant during the first three months of 2022, and so doubts whether the value of the 1st claimant's realty, is sufficient to compensate her for the potential losses she would incur from the injunctive relief being sought. In my opinion however, the effect of the interim

¹⁷ 4th Affidavit of Monica Walker filed September 16, 2022.

injunctions relating to the private nuisance claim, will not shut down the operations of the restaurant. The restraint is in relation to alleged unreasonably loud and intolerable human noises that travel over 100 feet from the restaurant's operations, foul smells from the burning of waste and privacy right breaches, which allegedly affect the quiet enjoyment by the 1st claimant of her property. If, as the 1st defendant says, the business is a first-rate refined dining establishment, from which loud boisterous noise does not emanate, then surely the interim injunctions ought not to adversely affect its operations. As to the allegations in respect of the burning of waste and the repositioning of the security cameras, it is inconceivable that the restrains in relation to these matters will affect the 1st defendant's business in any adverse way. I am therefore of the view that the 1st claimant's evidence as to her undertaking as to damages and its adequacy, is satisfactory.

Costs

[29] I believe that on balance, given the successes on both sides in this application (including the hearing on November 9, 2023, where I reserved costs) , I believe a fair award is that the claimants should get 50% of their costs.

Conclusion

[30] I therefore make the following orders:

1. Until the trial of the claim, the 1st defendant is restrained from hosting gatherings on premises known as 9 Haining Road, Kingston 5, that cause loud human noise (including but not limited to talking, shouting, clapping and screaming) that travel distances of more than 100 feet outwards from the said premises.
2. Until the trial of the claim, the 1st defendant is restrained from disposing of waste by burning same against the boundary wall

between 9 Haining Road, Kingston 5 and 11 Haining Road, Kingston 5.

3. Until the trial of the claim, the 1st defendant is to reposition the security cameras placed by her on 9 Haining Road, Kingston 5, so that they are not recording or monitoring the common areas of the premises of 11 Haining Road, Kingston 5.
4. The interim injunction seeking to restrain the defendants from playing amplified music at high volumes that travel distances of more than 100 metres outwards from premises known as 9 Haining Road, Kingston 5 in the parish of St Andrew is refused.
5. The interim injunction seeking to restrain the defendants' operation of loudspeakers and other sound amplification devices, by themselves or their agents, at 9 Haining Road, Kingston 5 in the parish of Saint Andrew from exceeding a maximum of 55 decibels (dBA) between the hours of 7:01 A.M. and 9:59 P.M. daily and 50 decibels (dBA) between the hours of 10:00 P.M. and 7:00 A.M. nightly is refused.
6. The claimants are to have 50% of their costs of the application which is to be agreed or taxed.
7. A case management conference is scheduled for November 6, 2024, at 12 noon for 1 hour.

A Jarrett
Puisne Judge