Neutral Citation Number: [2015] EWCA Civ 456

Case No: B2/2014/1656

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CARLISLE COUNTY COURT
Mr Recorder Duncan Smith
2BW00140

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 May 2015

Before :

LORD JUSTICE PATTEN
LORD JUSTICE BRIGGS
and
LADY JUSTICE KING

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Between :

(1) PETER JAMES RAYMOND **(2) LESLEY RAYMOND**	**Claimants/ Respondents**
- and -	
(1) STEVEN FREDERICK YOUNG **(2) FIONA YOUNG**	**Defendants/ Appellants**

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Mr Anthony Elleray QC (instructed by **Green Solicitors**) for the **Appellants**
Mr Edward Bartley Jones QC and **Mr Stephen Connolly** (instructed by **Cartmell Shepherd**) for the **Respondents**

Hearing date : 22 April 2015

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Approved Judgment

Lord Justice Patten :

1. This is an appeal by the defendants, Mr and Mrs Young, against an award of £155,000 by way of damages for the diminution in value of the claimants' property caused by acts of harassment and nuisance. The award is contained in paragraph 5(4) of the order of Mr Recorder Duncan Smith which was made on 6 May 2014 following a trial in the Carlisle County Court.

2. The claimants, Mr and Mrs Raymond, are the owners of a property known as Lin Cragg Farm ("the Farm") at Blawith in Cumbria. Immediately adjacent to the Farm is Lynn Cragg Cottage ("the Cottage") which is owned and occupied by Mr and Mrs Young. The properties were originally in common ownership. They were purchased together with the adjoining farmland by Mr Young's father on 21 June 1950 and Mr Young was born at the Farm. In 1965, following his retirement, Mr Young's father sold off most of the Farm with the exception of the Cottage and reserved a right of way in favour of the Cottage over what has been called in the proceedings the Western Drive.

3. The Farm was sold to a Mrs Scott who almost immediately sold off most of the farmland (84 out of 91 acres) to a neighbouring farmer. On 11 September 1968 Mrs Scott sold the Farm (including what remained of the farmland) to Mr Charles Craig who used it as a weekend home. Mr Craig subsequently transferred the Farm to one of his companies and eventually on 14 June 1999 it was sold on to Mr and Mrs Alan Williams and Mr Williams' sister. In 2005 they were killed in an aircraft accident and on 17 August 2009 the Farm was sold by their executors to Mr and Mrs Raymond for £600,000. They have subsequently bought back some of the land which used to form part of the Farm up to its sale by Mrs Scott. In March 2010 they purchased a 7.37 acre field (Quarry Field) for £50,000 and in June of the same year they acquired Wood Park Meadow for a similar sum.

4. Mr and Mrs Young live at the Cottage with their four children three of whom are now grown up. Mr Young is a builder but between 1994 and 1999 he also ran and lived at the Red Lion Public House in Lowick. Mr Young's parents are now deceased and he and his wife are the registered proprietors of the Cottage.

5. The Recorder found that Mr Young and members of his family have been responsible for continuous acts of harassment, trespass and nuisance against the owners of the Farm for almost 40 years. He describes it in his judgment as a campaign of truculence and belligerence borne out of Mr Young's resentment against the acquisition and use of the Farm as a weekend home. In paragraphs 96 and 97 of his judgment, the Recorder said:

> "96. Having listened to 12 days' oral evidence and 22 witnesses as to fact, I am satisfied that since the sale of LCF by Frederick Young in 1965, the first defendant has been unable to accept the fact that he has no legal dominion over that property. It is clear from an examination of the historical evidence that it was his intention to make the life of those who occupy LCF a misery; that his campaign of belligerence has continued since the death of his father; that he has a deep-seated aversion to those wealthy enough to afford a second home the size of LCF;

> and that the notoriety of his conduct in the locality is an open secret. Though nothing turns on it, the allegation that he stated publicly that he had acquired a number of dead rats and it was his intention to strew the corpses over the courtyard at LCF, is one that I am inclined to accept. It is consistent with his conduct that has been demonstrated to my satisfaction and, I would add, his showing his buttocks to the security camera at LCF goes only to show his juvenile and disrespectful attitude.
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> 97. Without causing violence to language I am unable to describe his near 40 year campaign of truculence as transitory."

6. The claim form was issued by the Raymonds on 3 May 2012. It contains numerous allegations of trespass, nuisance and harassment the precise details of which do not matter for the purposes of this appeal. But, in summary, the claimants alleged that the defendants (including their children) had:

   (i) obstructed the use of the Western Drive;

   (ii) interfered or prevented the use of a right of way to a gate into Quarry Field;

   (iii) failed to control their dog and to prevent it from defecating at the Farm;

   (iv) caused trespass and nuisance with their guinea fowl;

   (v) left dustbins and other rubbish near to the back door and kitchen window of the Farm;

   (vi) burnt plastic and other noxious materials causing smoke;

   (vii) vandalised the two CCTV cameras, a greenhouse and other property; and

   (viii) physically intimidated Mrs Raymond.

7. The Recorder found these allegations proved and awarded damages under each head. For the trespass on and obstruction of the Western Drive and the right of way, he awarded a total of £3,600 calculated on a wayleave basis. He then proceeded to make awards ranging between £50 and £1,000 for the various acts of nuisance. The claimants also sought damages under these heads for the costs, distress and inconvenience which they suffered as a result of the individual acts of nuisance and harassment and also general damages for distress and inconvenience. In addition, they claimed damages for the diminution in value of the Farm which had been caused by the actions of the defendants.

8. The Recorder in Part VIII of his judgment made the specific awards of damages for the acts of nuisance I have mentioned but then rounded them up to a figure of £20,000 to include general damages for distress and inconvenience and to avoid double counting. He also awarded aggravated damages of £5,000.

9. That left the claim for damages for diminution in the value of the Farm. The Raymonds' case was that the conduct of the defendants, and in particular Mr Young, which the Recorder found had started long before the Raymonds purchased the Farm,

had blighted their property and reduced its value on a sale to any purchaser who was aware of the matter. The disclosure of disputes involving neighbours is now part of the standard pre-contract enquiries on any sale by private treaty. In June 2011 the Raymonds attempted to sell the Farm by auction in three lots with a reserve of £935,000 for all three lots. Disclosure of the problems with the Youngs was not required in the case of a sale by auction but, in the event, the reserve price was not met.

10. The Recorder heard expert evidence about valuation. Mr Humphrey Nicholson FRICS, who was called by the claimants, expressed the opinion that the defendants' conduct had resulted in a diminution in value of 20% which, on a valuation of £850,000 for the Farm, amounted to £170,000. The defendants' expert was Mr Howard Whitaker FRICS who said that in his opinion there would be no diminution in value post the making of the order if the court granted injunctive relief (as it did) to prevent further acts of nuisance and harassment occurring in the future. The behaviour complained of was historic and had ceased with the injunctions.

11. The Recorder preferred the evidence of Mr Nicholson to that of Mr Whitaker and therefore accepted that there had been a diminution in the value of the Farm. But he adjusted the amount of the diminution to £155,000 by treating the acts of nuisance as having a detrimental effect upon the value of the Farm itself rather than upon the additional land which the Raymonds had acquired. On the basis that the Farm would have had an open market value of £775,000 but for the dispute, the loss in value was £155,000.

12. Mr Elleray QC on behalf of the Youngs does not seek to challenge either the Recorder's treatment of the expert evidence or his acceptance that the various acts of nuisance and harassment would, without more, account for a reduction in the value of the Farm of some 20%. But he submits that the Recorder was wrong to have made the award of £155,000 because the effect of the injunctions which he granted was to exclude any residual loss of value attributable to the defendants' tortious conduct. Moreover the Court, he submits, had no evidence that the Raymonds intended or were likely to sell the Farm in the foreseeable future so as to crystallise and incur the loss in value for which his clients are responsible. In these circumstances, there was no loss under this head for which the Raymonds should have been awarded compensation by way of damages.

13. The first of those objections to the award which the Recorder made is advanced as a matter of legal principle rather than as a criticism of the Recorder's assessment of the facts. Mr Elleray bases this part of his argument on the award of the £155,000 being damages under what is now s.50 of the Senior Courts Act 1981 which empowers the court to grant damages in lieu of or in addition to an injunction. Damages under what was originally s.2 of the Chancery Amendment Act 1858 (*Lord Cairns' Act*) are now conventionally assessed on the basis of the sum which the claimant could reasonably have demanded for a licence to carry out what would otherwise be an invasion or infringement of his legal rights: see *Lunn Poly Ltd & Anor v Liverpool & Lancashire Properties Ltd* [2006] 2 EGLR 29; *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 WLR 2370. In such cases, the claimant is compensated for the loss (permanent or temporary) of his legal rights. It follows, as Lord Walker recognised in *Pell Frischmann* (at [48]), that damages awarded under *Lord Cairns' Act* in lieu of an injunction are intended to provide compensation for the court's decision not to grant

equitable relief in a case where the court had jurisdiction to grant such relief. From this Mr Elleray argues that where, conversely, the court has granted equitable relief in the form of an injunction, there is nothing to compensate the claimant for.

14. That submission, of course, assumes that the court's power to award damages under the Act in addition to an injunction does not permit an award of substantial damages in such circumstances. But it is not necessary to decide that point. My own difficulty about Mr Elleray's argument is that I do not accept that the Recorder in this case was awarding damages under *Lord Cairns' Act*. It seems to me clear both from the way in which the claim was pleaded and from the authorities which the Recorder refers to in his judgment that he was considering an award of damages for nuisance and harassment at common law.

15. In *Strange & Ors v Westbury Homes (Holdings) Ltd* [2009] EWCA Civ 1247 this court held that damages for the residual diminution in value of a property could be recovered as part of a claim for breach of contract. The defendant developers had failed to construct the houses "in a thorough and workmanlike manner" as required by the contract and remedial work was necessary to repair the defective brickwork. The claimants alleged and proved that even after these remedial works were completed the properties remained less valuable than they would have been had they been properly constructed in the first place because potential purchasers would be aware of the history of the defects and the future risk of spalling in the brickwork. The expert evidence was that there would be a residual diminution in value of 10% after taking into account the likelihood of further damage occurring and the way in which that risk would be perceived by a potential purchaser.

16. The trial judge had said:

> "36. I conclude that fear of further litigation would drive vendors into sufficient disclosure for the past history of defects and litigation to become known and that that, together with the very small risk of further problems, is just sufficient in the current climate to drive down the price for these properties, but only by a very modest amount. If the years go by and the claimants do not choose to sell and the market picks up and there are no further brickwork defects becoming apparent, this residual diminution in value could prove to be a windfall to the claimants. I do not think the commercial analogy helps here, by that I mean a percentage approach to the diminution in value, in a domestic setting. I am conscious that I am departing from both experts so that it can be said that my conclusion is unsupported by evidence, but this is a difficult area in which no scientific approach is possible. I was careful to ask counsel whether or not a point someway in-between the various extremes that they contended for would be unjustified and they conceded that it would not.
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> 37. I have come to the conclusion that a reasonable figure for residual diminution of loss in all the circumstances of this case would be £5,000 per property. Now, that is two-and-a-half times the general damages per household that would be

> awarded for discomfort and inconvenience, as I shall shortly indicate. It also, as it happens, represents about two-and-a-half per cent of the market value of the properties, but I emphasise that in arriving at the lump figures I have I have not followed a percentage approach. It represents, on the limited evidence available, a judicial guesstimate of how, in the current climate, negotiations may go, in the hypothetical event of one of these properties coming onto the market, a judicial guesstimate of the discount which it would be reasonable to agree in the light of the past history which we must assume is entirely resolved by satisfactory repair of the agreed rectification works and of a purely cosmetic defect and a further risk which is deemed to be remote and barely significant. If the parties are equally disgruntled by such approach, it may be that I have got it about right."

17. His decision was upheld by the Court of Appeal. Dyson LJ said:

> "15. We have been referred to the decision of HHJ Hicks QC in George Fischer Holding Limited v Multi Design Consultants Limited [1994] ORB 775, and in particular paragraphs 198 and 199 of his judgment. In paragraph 198 the judge said that a residual diminution in value of the property following the completion of remedial works is a recognised head of loss which can be the subject of an award of damages if the facts justify making such an award. At paragraph 199 he referred to the evidential dispute that there was in that case between the two experts. One expert was saying that there would be a residual diminution in value of £200,000, which amounted to nearly 3% of the value free of defects. The other expert said that there would be no residual diminution in value. The judge concluded: "I assess the diminution in value at £100,000".
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> 16. Mr Singer accepts that in principle it is possible for a court to award damages for a residual diminution in value of property following the satisfactory completion of remedial works if it is satisfied that such a residual diminution in value has been proved on the evidence. In my judgment he is right to make that concession. I find it difficult to see on what basis it can properly be said as a matter of principle that such an award of damages cannot be made. It must always depend on the facts of the case. Mr Singer appeared to submit that this principle had little or no application in the case of residential property. He seeks to distinguish the Fischer case from the present case on the grounds that the Fischer case concerned a very substantial commercial property. I cannot accept that this is a proper or principled basis for distinguishing the two cases. If the evidence supports the conclusion that the proper carrying out of remedial works to a residential property will nevertheless result in there being a residual diminution in the value of the property,

> then I cannot see in principle why the claimant should not be awarded damages to reflect that diminution in value. Nor can I accept Mr Singer's submission that it was not open to the judge to award damages under that head because the claimants apparently had no present or fixed future intention to sell their properties. The fact that the claimants did not intend immediately to sell their properties did not mean that the assessment of the diminution in value involved a hypothetical exercise and guesswork as to what the market conditions would be at the time when, if that time did occur, the claimants came to sell their properties.
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> 17. The time for carrying out the assessment was either the date of trial or the date when the remedial works were completed. For practical purposes, there is no difference between these two dates in the present case. It seems to me that the judge was entitled to award the damages that he did under this head, especially in the light of the concession made by counsel. I wish to emphasise that is only right to award damages under that head if there is cogent evidence of a residual diminution in value. In cases where what is being contended for is some modest residual diminution in value, a court may well conclude that it is not satisfied that it is appropriate to award damages under this head. As I have said, each case turns on its own facts."

18. *Strange*, as I have said, was a claim for damages for breach of contract but the Recorder in this case has applied the same principles to the claim for damages for nuisance and harassment. We were referred to a number of cases in which damages have been awarded for the residual diminution in value of the claimant's premises occasioned by acts of nuisance. In *Bunclark v Hertfordshire CC* [1977] 2 EGLR 114, a case of damage caused to a block of flats by encroaching tree roots, the court awarded damages for the cost of the necessary repairs plus general damages for the residual diminution in the value of the flats caused by the reputational effects on the saleability of the flats. The judge in that case also awarded the claimants general damages for the discomfort and distress caused by having to live in the flats during their state of disrepair.

19. In *Fowler v Jones*, an unreported decision of Mr Recorder Morris-Coole in the Haywards Heath County Court dated 10 June 2002, the facts were very similar to those in the present appeal. The claimants sought damages for nuisance and harassment and an injunction in respect of a variety of acts by the defendant, their neighbour. These included the lighting of bonfires, noisy dogs, obstruction of a right of way, damage to their property and generally abusive conduct. The Recorder awarded damages for loss of amenity and made an injunction but refused to make an award of damages for the residual diminution in value of the claimant's property that would result from a potential purchaser becoming aware of the problems caused by the defendant. The recorder said:

> "The claimants argue that they have suffered a diminution in the market value of their property because of the prolonged

> nuisance and the obligation that they have to disclose this to a prospective purchaser in response to normal pre-contract enquiries. They also say that this dispute is notorious and this will depress the market value of the Farmhouse, and deter would-be purchasers. A joint expert valuers' report dated September 2001 derived from individual reports indicates that if all the Fowlers' allegations against Miss Jones are made out the market value of the Farmhouse of £375,000 would be reduced by 20 per cent (£75,000). On the other hand, if all the allegations fail, there will be no effect on the market value. This is not a case where reinstatement will rectify the damage so that the diminution in value can be quantified accordingly. It follows that this argument has to be approached in the context of the actual nuisance and not simply confined to a given point in time. This nuisance is capable of being abated, and so the diminution in value may not exist in the future, or it may be reduced substantially. Also, for example, if Miss Jones were to move away, or if the prohibition against her having control of animals were to be upheld and enforced, the nuisance may cease. The acrimony between these neighbours would become history, and there is no reason why that should adversely affect the value of the Farmhouse.
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> The situation in this case is similar to the situation foreseen by Lord Hoffmann in *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426 HL at 451h:
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> > "But diminution in capital value is not the only measure of loss. … In the case of a transitory nuisance, the capital value of the property will seldom be reduced. But the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted. To some extent this involves placing a value upon intangibles. But estates agents do this all the time."
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> With respect, I consider this to be the appropriate approach in this case, and not to attempt to evaluate a percentage of proved "nuisance level" and apply it to the experts' scale of diminution of value."

20. The Recorder therefore awarded damages for loss of amenity caused by the various acts of nuisance but declined to assess damages by reference to the diminution in value of the property modified (as in *Strange*) to take account of the likelihood of the dispute actually impacting upon a future sale. Mr Elleray submits that the Recorder in the present case should have taken the same course. Had he done so his award of £20,000 for loss of amenity would stand but not the award of £155,000 for the residual diminution in value.

21. Another case which post-dates the decision in *Fowler v Jones* is *Dennis v Ministry of Defence* [2003] 2 EGLR 121. This was cited to the Recorder but not referred to in his judgment. It was a claim for damages for nuisance by the owners of a Grade 1 listed country house, Walcot Hall, which is situated less than 2 miles from RAF Wittering. The RAF base was used for training and the operation of Harrier jump jets and the level of noise was said to have caused a very serious interference with the claimants' enjoyment of their property. Buckley J held that the noise generated by the aircraft did constitute an actionable nuisance and awarded damages of £950,000.

22. The claim in *Dennis* was made up of three elements: (i) past and future loss of amenity; (ii) past and future loss of use; and (iii) loss of capital value. The first and third heads of loss are those pursued in the present case. But the second was a claim based on the loss of income which the claimants alleged they would have earned from the commercial exploitation of Walcott Hall but which was prevented by the problem of aircraft noise. There is no comparable claim in the present case.

23. Buckley J accepted that the claim for loss of capital value could not simply be a snapshot figure calculated at the date of trial without regard to future circumstances. The evidence was that Harrier operations would cease after eight years, although there was the possibility that they would be replaced by other jet aircraft. He also had to factor in the likelihood of Walcott Hall being sold within that timescale:

> "As to loss of capital value, Mr Dennis is not forced to sell the estate and thus suffer the present drop in market value. He has stated that he does not wish to sell and has no present intention of doing so. In 2012, the value will be restored or Mr Dennis will have a new cause of action. However, I consider it fair to recognise that circumstances might arise in which Mr Dennis would either be forced to sell or reasonably decide to do so. In other words, for the next nine years or so he carries the risk of having to sustain the capital loss. The family's determination to retain the estate is evidenced by the fact that Mr Dennis has owned it since 1984. I cannot therefore assess the risk of his being forced to sell as high but it is there. No particular risk was drawn to my attention but the ordinary vicissitudes of life suggest to me that it should be assessed as somewhere between 5% and 10%."

24. The next stage in the assessment was to consider whether the damages for loss of amenity (which he calculated at £50,000 on a stand-alone basis) and for loss of value (£300,000) could each be awarded. The judge said:

> "88. I think it appropriate, in the particular circumstances of this case, to consider the three heads of damage I have mentioned, but to take an overview. In *Hunter v. Canary Wharf Ltd.* [1997] AC 655, their lordships considered loss of amenity as an appropriate measure where no capital loss was established and loss of use as an additional head. See in particular Lord Hoffman at page 707. In this case I am not awarding the full present capital loss and I consider a significant loss of amenity should be allowed, albeit not to the extent I would have

> awarded if that were the only head. I also think there is some interplay here between capital value and loss of opportunity to exploit the property commercially. Thus I take into account the three identified heads in arriving at an overall figure, but do not simply add them together. They are a guide.
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> 89. My approach to the risk of capital loss would lead to a figure in the region of £300,000. In respect of loss of use, it is unrealistic to expect the net profit after tax to remain constant, but the findings I have made give a guide to the amount I would allow for this aspect of the claim. I have included 6 years for past loss. I have had in mind that the figures are gross of tax and I have accepted that by 1997 the business would have been fully established. I also allow for immediate payment of the future loss. I have indicated that I consider the particular circumstances of this case would merit a significant award for loss of amenity. This, of necessity, is an imprecise calculation. It is one that should reflect the size and nature of the Estate and its general location. I do not believe an award of less than £50,000 would do justice to the serious loss of amenity over a considerable number of years if this aspect stood alone. That figure would scarcely cover the cost of a decent holiday each year, which it might be thought is the least compensation that should be awarded for such a disturbance. I believe my findings give a sufficient indication of the approach I have adopted and how I arrive at my final figure.
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> 90. The overall figure for damages I regard as appropriate in this exceptional case is £950,000."

25. In *Hunter v Canary Wharf Ltd* [1997] AC 655 the House of Lords re-affirmed that the cause of action in private nuisance is a claim for injury to a proprietary or other interest in land even where the nuisance (such as smells, air pollution or noise) causes no physical damage to the claimant's land itself but merely affects its reasonable use and enjoyment. The Protection from Harassment Act 1997 is different in that it provides a civil remedy for conduct amounting to the harassment of another person. But damages can be awarded under s.3(2) for any anxiety caused by the harassment and any financial loss resulting from it. It was not, I think, suggested to the Recorder that he should approach the assessment of damages under s.3(2) on a different basis from that applicable to the claim in nuisance and, as I shall explain later in this judgment, he made a global award of £20,000 to encompass the claims in nuisance and for harassment, both of which were based on the same actions of the defendants and the distress and inconvenience which they caused.

26. Lord Hoffmann explained the relevant principles applicable to damages for nuisance in his speech in *Hunter* at p.706:

> "In the case of nuisances "productive of sensible personal discomfort," the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered

"sensible" injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation.

I cannot therefore agree with Stephenson L.J. in *Bone v. Seale* [1975] 1 W.L.R. 797, 803-804 when he said that damages in an action for nuisance caused by smells from a pig farm should be fixed by analogy with damages for loss of amenity in an action for personal injury. In that case it was said that "efforts to prove diminution in the value of the property as a result of this persistent smell over the years failed." I take this to mean that it had not been shown that the property would sell for less. But diminution in capital value is not the only measure of loss. It seems to me that the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not. In the case of a transitory nuisance, the capital value of the property will seldom be reduced. But the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted. To some extent this involves placing a value upon intangibles. But estates agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case: compare *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] A.C. 344.

There may of course be cases in which, in addition to damages for injury to his land, the owner or occupier is able to recover damages for consequential loss. He will, for example, be entitled to loss of profits which are the result of inability to use the land for the purposes of his business. Or if the land is flooded, he may also be able to recover damages for chattels or livestock lost as a result. But inconvenience, annoyance or even illness suffered by persons on land as a result of smells or dust are not damage consequential upon the injury to the land. It is rather the other way about: the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness.

It follows that damages for nuisance recoverable by the possessor or occupier may be affected by the size, commodiousness and value of his property but cannot be increased merely because more people are in occupation and therefore suffer greater collective discomfort. If more than one person has an interest in the property, the damages will have to be divided among them. If there are joint owners, they will be jointly entitled to the damages. If there is a reversioner and the nuisance has caused damage of a permanent character which affects the reversion, he will be entitled to damages according

> to his interest. But the damages cannot be increased by the fact that the interests in the land are divided; still less according to the number of persons residing on the premises. As Cotton L.J. said in *Rust v. Victoria Graving Dock Co.*, 36 Ch.D. 113, 130:
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> > "where there are divided interests in land the amount of damages to be paid by the defendants must not be increased in consequence of that subdivision of interests."
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> Once it is understood that nuisances "productive of sensible personal discomfort" (*St. Helen's Smelting Co. v. Tipping*, 11 H.L.Cas. 642, 650) do not constitute a separate tort of causing discomfort to people but are merely part of a single tort of causing injury to land, the rule that the plaintiff must have an interest in the land falls into place as logical and, indeed, inevitable."

27. The issue in *Hunter* was whether a claim in private nuisance could be maintained by occupiers of flats whose television reception had been interfered with by the construction of the Canary Wharf Tower but who did not have a lease or other right to exclusive possession of their own properties. But I read the passage I have quoted as an endorsement of the principle that damages for what is commonly described as loss of amenity are damages for the diminution in the value of the right to occupy the affected property and not merely damages for the personal distress or inconvenience suffered by the individuals concerned. They are intended to and do compensate the claimant landowners for the distress and loss of amenity which they experience as a result of the nuisance but only in terms of the consequent loss in the use value of their property. For this reason, as Lord Hoffmann explains, the damages are not increased simply because the property is occupied by more than one person.

28. It must, I think, also follow from this that it is not appropriate to make separate awards of damages for distress in cases of nuisance. The consequences in terms of personal distress or discomfort which the claimant may experience as a result of the nuisance are, as I have said, simply part of the assessment of the claimant occupier's loss of amenity. As Waller LJ said in *Dodson v Thames Water Utilities Limited (No. 1)* [2009] EWCA Civ 28:

> "The speeches of the majority thus clearly establish that damages in nuisance are for injury to the property and not to the sensibilities of the occupier(s). That is so as much for the case of the transitory nuisance interfering with comfort and enjoyment of the land as it is for the case of the nuisance which occasions permanent injury to the land and to its capital value, or other pecuniary loss."

29. The assessment of loss may be complicated by the fact that the nuisance is transitory in the sense of being time limited such as in *Dennis*. But what Lord Hoffmann contemplates is that in such cases the measure of damages should reflect the diminution in the value of the right to live in the property during the relevant period. An obvious analogy would be the reduction in the letting value of the property which

the nuisance would cause. What he is not saying is that merely because the nuisance may be transitory it is not possible or appropriate to make an assessment of the diminution in value which results while it lasts. The other important principle which *Hunter* confirms is that damages for nuisance in the form of what is described as loss of amenity value is simply an alternative method of calculating the diminution in value of the property in cases where the damage attributable to the nuisance is not likely to be permanent. As Buckley J recognised in *Dennis*, it will therefore be possible to add to damages for capital loss or loss of amenity value damages for loss of profit but the first two of these items are alternatives. If the case is one where it is appropriate to calculate damages by reference to the diminution in value as at trial adjusted to take account, for example, of the fact that the property may never be sold, it will be double counting to award the successful claimant the full value of the diminution in the amenity value of his property. The two, as Lord Hoffmann explains, are simply different ways of calculating the same loss.

30. The decision in *Fowler v Jones* can therefore be supported on the basis that the Recorder considered he was dealing with a state of affairs that was likely to be limited in point of time. He therefore assessed the damages by reference to the loss of amenity value for the relevant period rather than by assuming that the defendant's conduct would remain a constant blight on the value of the claimant's property. In *Dennis*, Buckley J accepted that the diminution in the value of Walcott Hall due to aircraft noise assessed as at the date of the trial was £4m but reduced this to £300,000 to take account of the limited future duration of the nuisance and the chances of the property being sold in the meantime. He added a further £50,000 to this for loss of amenity which was itself a reduced figure to take account of the fact that his calculation of loss of value included the £300,000. I have some misgivings about this methodology in the light of *Hunter* but what is clear is that the judge recognised that the claimants were not entitled to the full amount of the £4m or what they might have achieved on a loss of amenity value calculation had no capital loss been proved.

31. In the present case, the Recorder found on the basis of the expert evidence that the value of the Farm at the date of trial would be reduced by £155,000 in the case of a potential purchaser who was made aware of this dispute. There is no challenge to that finding as such but Mr Elleray submits that the Recorder was wrong to have made an award of damages in that sum. Given that he had also granted an injunction the Recorder, he says, should have assumed that the injunction would be sufficient to prevent any future acts of nuisance by the defendants and, more to the point, that any potential purchaser would have proceeded upon the same assumption.

32. If he is wrong about the injunction being a complete answer to any continuation of the nuisance and the loss of value then he submits that the Recorder should at least have carried out a similar exercise to the assessment of damages in *Dennis* and have decided whether the damage caused by knowledge of the dispute and the continuing presence of the Youngs was likely to be permanent and whether the Raymonds were likely to sell the Farm in that period and thereby incur the loss in value.

33. The Recorder addressed some of these issues in paragraphs 93-95 of his judgment:

> "93. From a review of these authorities I derive the following principles of law:

> - A court can award damages for residual diminution in value of property;
>
> - residual damage must be proved on the evidence;
>
> - in the case of a transitory nuisance, the capital value will seldom be reduced.
>
> 94. I do not derive from those authorities the principle for which Mr Elleray QC contends, that the effects of a belligerent neighbour cannot in law lead to residual damage to property.
>
> 95. I have to decide whether the nuisances and the harassment that I have found proved can properly be described as transitory such that the injunctive relief sought would provide adequate satisfaction to the claimants. Save to say the authorities suggest the distinction between a transitory nuisance and residual damage, I am conscious that a finding of belligerent neighbour activity establishing residual damage may be breaking new ground."

34. As quoted earlier, he concluded (in paragraph 97) that the defendants' conduct could not be described as transitory by which I take him to mean that it is likely to continue to be a facet of Mr Young's character and behaviour so far as not restrained by the injunction. I do not therefore accept that the grant of a permanent injunction in the claimants' favour at trial is likely to be treated by a potential purchaser as a guarantee that they will not be subjected to the same treatment. The purchaser will know (or be advised) that the benefit of the injunction is personal to the Raymonds and that on a sale the protection it affords will effectively end. The Raymonds would cease on a sale to have any interest in continuing to enforce it and arguably have no locus to do so once they have parted with ownership of the Farm. Any further repetition of the same sort of conduct towards the incoming purchaser would necessitate fresh proceedings for an injunction with all the cost and trouble which that would involve.

35. Nor do I accept that the Recorder in calculating the award of £155,000 failed to factor in his assessment of whether the present injunction would effectively exclude any diminution in value. I accept Mr Bartley Jones' submission that the 20% drop in value was Mr Nicholson's calculation of the reduction in value which the potential purchaser would seek based on his consideration of the likelihood of the nuisance continuing. It therefore includes an allowance for the fact that the existing injunction would not function as a guarantee of there being no further acts of disturbance by Mr Young once the claimants had sold the Farm. The Recorder was not required to make any further adjustment to reflect that issue.

36. In relation to Mr Elleray's point that the Recorder also failed to make an assessment of whether the Raymonds were likely to sell, Mr Bartley Jones submits that this point was simply not raised by the defendants at the trial as relevant to the assessment of damages. The evidence was that they had tried, unsuccessfully, to sell the Farm by auction in 2011 and the Recorder was therefore entitled to assume, absent evidence to the contrary, that there was a realistic possibility of a sale in the foreseeable future. If the defendants had wanted to make anything of this point then Mr and Mrs Raymond

could have been cross-examined about their future intentions when they gave evidence.

37. I accept this submission. I think this was a point for the trial and the assessment of damages. The Recorder cannot be criticised for failing to make allowances for the fact that the Farm might not come to be sold when this was not pursued as part of the trial.

38. For these reasons, I consider that the award of £155,000 for diminution in value calculated on the basis that the threat of a nuisance to future purchasers would continue was one which the Recorder was entitled to make. The facts of the case as summarised in paragraphs 96-7 of the Recorder's judgment are very extreme. The case is not like *Dennis* or *Fowler v Jones* where the court proceeded on the basis that the nuisance was only likely to be transitory. That said, the Recorder was in my judgment wrong to award the claimants both the £155,000 for loss of value and a further £20,000 for loss of amenity or distress. It is clear from Part VIII of the judgment that the £20,000 is a composite award which includes both damages in nuisance for loss of amenity and general damages for the anxiety and distress caused by the acts of harassment. The Recorder indicates that for the specific acts of nuisance he would have awarded a total of £2,900 without having regard to the contribution of those acts to the distress and harassment of the claimants. This sum was then increased to £20,000 to include general damages for anxiety and distress caused by the defendants' actions and to avoid double counting. It is therefore clear that the award of the £20,000 was intended to represent compensation for loss of amenity value, including the distress and inconvenience which the defendants' actions had caused. For this purpose, the Recorder made no distinction between the claims in nuisance and for harassment.

39. The Recorder was wrong in my view to have awarded the claimants the full measure of their capital loss and also £20,000 by way of damages for loss of amenity. Unlike in *Dennis*, the loss of capital value figure has not been reduced to take account of the transitory nature of the nuisance and is historic in the sense that it represents the consequences of the defendants' acts of nuisance over the period up to the trial. There is therefore double recovery in this case by the award of both sums. They are alternative methods of calculating the diminution in value of the claimants' property and if damages are to be awarded for loss of capital value then damages for loss of amenity are excluded.

40. If one treats the £20,000 (or a significant part of it) as representing damages for distress rather than for loss of value as such, there is still double counting. As already explained, damages for distress are not recoverable separately in nuisance from an award for loss of value. The distress suffered by the claimants is reflected in the damages awarded for loss of value and compensated for accordingly. Although the claimants have also succeeded in their claim for damages for anxiety and financial loss under s.3(2) of the 1977 Act, that cannot add to the award of £155,000 which compensates them for all the distress they have suffered in the way I have explained. The 20% reduction in value took account of the impact of the defendants' conduct on the claimants and their property. I would therefore reduce the total award of damages by £20,000 to eliminate the element of double recovery. The awards of £3,500 as damages for trespass and £5,000 as aggravated damages are unaffected by this point.

Subject to that adjustment, I would dismiss the appeal against paragraph 5(4) of the Recorder's order.

41. That leaves the appeal against costs. The Recorder ordered the defendants to pay the costs of the action on an indemnity basis and to make an interim payment on account of costs of £150,000. Mr Elleray submits that the award of indemnity costs was wrong in principle because indemnity costs should be awarded to reflect the court's disapproval of the paying party's conduct of the litigation: not the conduct which is the subject of the litigation. Otherwise virtually every losing defendant would be required to pay indemnity costs. It was not therefore enough, he says, that the Recorder had reached adverse conclusions about the way in which the Youngs behaved towards the Raymonds.

42. It is right that indemnity costs are generally awarded in cases where the paying party has conducted the litigation in a way which the court regards as unjustified. The successful party is compensated for the unlawful conduct of a losing defendant by the award of damages which the court makes. But, in this case, the Recorder in his separate judgment on costs makes it clear that the award of indemnity costs is intended to reflect the defendants' pursuit of unrealistic claims and assertions during the litigation. Their case remained throughout that the allegations of nuisance were unfounded or invented and that they were part of a campaign by the Raymonds to drive them out.

43. The Recorder found that there was no truth in these allegations and that the Youngs raised them as part of a defence which they always knew was false and had no prospect of success. In these circumstances, the Recorder was entitled in my view to consider an award of indemnity costs and there are no grounds for interfering with his decision. The same must go for the order for the interim payment. The appeal against the costs orders must therefore be dismissed.

Lord Justice Briggs :

44. I agree.

Lady Justice King :

45. I also agree.