Birnie & Birnie v The States of Guernsey & Lagan Construction Limited **JUDGMENT**
Royal Court **27/2015**
10th June, 2015

Action by the Plaintiffs for damages for nuisance and/or under the Human Rights (Bailiwick of Guernsey) Law 2000 (as amended).

Approved Text
10.06.2015

IN THE ROYAL COURT OF GUERNSEY
Case No CIV 1757
(ORDINARY DIVISION)

BETWEEN:

(1) IAN BIRNIE
(2) CATHERINE BIRNIE

Plaintiffs

and

(1) THE STATES OF GUERNSEY
(2) LAGAN CONSTRUCTION LIMITED

Defendants

Hearing dates: 28th - 30th April 2015,
1st May 2015
and 5th May 2015

Judgment handed down: 10th June 2015

Before: Her Hon Hazel Marshall QC, Lieutenant Bailiff
Jurats: B J Bartie, S M Jones and M A Spaargaren

Plaintiffs:	**In person**
Counsel for the First Defendant:	**Crown Advocate J Hill**
Counsel for the Second Defendant:	**Advocate M G A Dunster**

Cases, texts and legislation referred to:

(a) Legislation:

Human Rights (Bailiwick of Guernsey) Law 2000, Ss 6 and 8
Royal Court (Reform) (Guernsey) Law 2008, Ss 14 and 16

(b) Cases:

Guernsey

Dadd v Guernsey Rifle Club [1993] 15 GLJ 62

Morton v Paint [1996] 21 GLJ 61 (CA),

England and Wales

Harrison v Southwark and Vauxhall Water Co [1891] 2 Ch 409
Malone v Lasky [1907] 2KB 141
Andreae v Selfridge & Co [1938] Ch 1.
Hunter v Canary Wharf Ltd [1997] AC 655.
Murdoch v Glacier Metal Co Ltd CA (Unreported) The Times 21 January 1998
Hiscox Syndicates Ltd v Pinnacle Ltd [2008] EWHC 145 (Ch)
Dobson v Thames Water Utilities and others [2009] EWCA Civ 28

(c) Textbooks and articles

Dawes: *The Laws of Guernsey (2003)* Chs 1 and 24
Clerk & Lindsell: *The Law of Torts 20th Ed* para 20-26

MacLeod: "*Voisinage* and Nuisance in the Law of Jersey"[2009] J&GLR 274

JUDGMENT

Introduction – the claim

1. This has been the hearing of an action brought by the Plaintiffs, Mr and Mrs Ian Birnie, against the First Defendant, the States of Guernsey ("the States") for damages for nuisance and/or under the Human Rights (Bailiwick of Guernsey) Law 2000 (as amended). The claim arises from physical damage to the Plaintiffs' property and interference with their use and enjoyment of it, caused, they claim, by construction works for which the States are responsible. The Second Defendants, Lagan Construction Limited, ("Lagan") were the contractor engaged by the States to carry out those works. The works in question were the second phase of the modernisation of Guernsey Airport, which involved the wholesale repaving of the airport runways, taxiways, aprons, safety areas and landscaping of the surrounds. It took place in 2012-13.

2. The particular operations giving rise to the Plaintiffs' complaint were carried out on land near to their home and known as the Southern Compound. This was the site used for plant, machinery, vehicles, storage of materials and the placing and crushing of spoil, in conjunction with the repaving project.

3. The Defendants resist the claim. They do not admit the particular matters of alleged damage and disturbance as such, but in any event they deny that such as may be proved amounted to a nuisance as recognised by law at all. If they did, the States say that they have a defence in law, in the circumstances of this case, because they did everything reasonably possible to minimise any nuisance or annoyance to the Plaintiffs (and indeed to other neighbours of the airport) from the works in general and the operations on the Southern Compound in particular. They rely on the vital public interest in doing these works to repair and modernise the island's airport.

4. At the start of the hearing, the Court was told that the Plaintiffs and Lagan, had reached a settlement under which the claim against Lagan would be dismissed with no order as to costs. This is readily understandable, as the cause did not allege any claim against Lagan for which the States would not also be responsible if it were made out. The settlement has no effect on the claim against the States, and the trial has therefore proceeded against the States alone, with the witnesses of fact who would have appeared for Lagan being called instead on behalf of the States.

5. A claim for an injunction to halt the offending works, made when the action was launched in December 2012, was formally withdrawn at the outset of the hearing; the works were completed and the Southern Compound largely re-landscaped a year ago. The action against the States has therefore proceeded only on the claim for damages, an important point to remember when reading

this judgment as the considerations with regard to the grant of an injunction and the award of damages can differ. As to the amount of the damages claimed by the Plaintiffs, this was quantified shortly before the trial in the total sum of £524,274, although at times over the progress of the case to trial it has varied to figures both lower and considerably higher.

6. Although the Plaintiffs had legal representation when the action commenced and their cause was professionally drafted, they have since dispensed with their advocates, although they did instruct other advocates for the purpose of an unsuccessful attempt at mediation during 2014. They have appeared at the trial in person. Mr Birnie was their prime spokesman. The States were represented by Crown Advocate Jason Hill.

Procedural matters

7. This is a decision of the Court and this written judgment has been prepared in accordance with Section 16 (5) of the Royal Court (Reform) (Guernsey) Law 2008. Pursuant to Section 14 (2) of the 2008 Law, the Lt-Bailiff did not sum up to the Jurats in open court but instead retired with the Jurats.

8. The Lt-Bailiff gave both general and specific directions to the Jurats. Her general directions were, first, to remind them of her and their respective roles, namely that the Lt-Bailiff is the sole judge of matters of law and procedure and the Jurats must follow her directions on such matters, but that the Jurats are the sole judges of questions of fact. She directed the Jurats that insofar as she might herself appear to express any views on the facts when guiding their deliberations, the Jurats should ignore these and form their own independent judgment. She further directed the Jurats that the burden of proof with regard to the decisions that they would be required to make was the ordinary civil standard of proof, namely proof "on balance of probability", and that this meant simply that they must be satisfied that the particular fact in issue was more likely to be so, than not to be so. The Lt-Bailiff's more specific directions are mentioned elsewhere in this judgment where they are material. Where this judgment sets out holdings of law and reasons therefor, they are the holdings and reasons of the Lt-Bailiff. Where it sets out findings of fact and reasons therefor, they are the unanimous findings and reasons of the Jurats.

Outline facts

9. The Plaintiffs (together "the Birnies"), occupy a house ("the house") known as Vue de l'Eglise in the Forest (the *église* being Forest Church), purchased about 12 years ago. They live there with their son Richard, who has recently attained the age of 18. Although the cause states that the house is owned by Mr Birnie with whom Mrs Birnie resides, they confirmed at the trial that the house is actually in the sole name of Mrs Birnie. At the relevant time, Mrs Birnie worked full time as a superintendent sonographer at Princess Elizabeth Hospital. Mr Birnie develops property in the UK and is accustomed to work from home. Richard attends Elizabeth College and was at the material times, studying for GCSEs.

10. The house lies on the east side of a lane also called Vue de l'Eglise, and is about two hundred yards south of Rue des Landes, the main road running west-east in front of the entrance and public car park of the Airport. The property is an L-shaped plot, with its corner towards the northwest, the infill of the L shape in the south-east being part of the Occupation Museum and car park. The house is a five bedroomed house, also broadly L shaped in the same orientation as the plot, but with some outbuildings to the north. Its main façade is on the west side beside the lane, separated by a high *eleagnus* hedge on the boundary. The main entrance to the property is on the south, from a side lane. There is a conservatory and paved patio in the crook of the L shape of the house and a garage block in the south with a swimming pool and poolhouse behind that to the east. Otherwise, on the north and east of the house there are gardens including lawns further paved areas, and a koi carp pond.

11. To the west, across the lane from the property are fields. Beyond the first narrow field there are larger fields which have access directly on to Rue des Landes to the north, immediately opposite the entrance to the airport. Further west there are more fields and then a housing estate.

12. The locality is in the Western Parishes of Guernsey and is rural in character, being mainly agricultural but punctuated by moderate residential development. It is thus generally quiet, commensurately with such character. The only significant deviation from this is the airport itself. However, airport activity takes place only during the day, between the arrival of the first morning plane at about 6.30 am on weekdays and the arrival of the last flight in the evening, normally before 9 pm. After the erection of the new airport terminal building, the Birnies say they experienced light pollution at night, which they had not had before, but they planted the *eleagnus* hedge to alleviate this.

13. During 2011, the Birnies found another property which they wanted to buy and move to, because it had more land on which they could pursue their son's desire to farm alpacas and breed koi carp. However, they needed to sell Vue de l'Eglise in order to make this purchase, and so they put it on the market.

14. At this time the detailed plans for the second phase works to the airport had not been made public. The airport is, it is universally agreed, on a relatively small site and is thus constrained. With this restriction and the necessity to keep the airport functioning as fully as possible whilst the works were going on, difficult decisions had to be made about both when the actual work should be carried out and also where the necessary plant, machinery and materials for doing so should be located. Batching facilities for both concrete and asphalt were required, as well as suitable access for bringing in materials, space for storing them, space for support buildings and for vehicles and space for depositing and crushing the concrete spoil which would be removed from the existing runways and re-used.

15. In the autumn of 2011, proposals were unveiled to make a site for at least some of these operations in a compound comprising two fields opposite the road entrance to the airport. These did not include the narrow field immediately opposite the Birnies' property, but the next two fields further west. The works were scheduled to continue for some 18 months.

16. Mr Birnie immediately expressed vehement objections to the proposals in letters to the Planning Department and to the Minister for Public Services. He argued that using those fields would inevitably expose the States to claims for compensation from him for disturbance of at least £400,000 - a prediction which, he said at the trial, could now be seen to be all too accurate. He proposed that materials should be batched elsewhere and merely transported into the site. Deputy Flouquet, the Minister at the time, refuted these arguments, pointing out that no liability for compensation would be incurred unless an actionable nuisance were proved to have taken place, that redeveloping the airport was in the public interest and was a proper and reasonable use of States' property, and that the actual proposals for use of the compound would be subject to scrutiny by the Planning Department. He claimed (though not correctly as a point of law) that if the proposals were approved for planning purposes, then there would be no such nuisance.

17. Planning permission for the works, including those for the Southern Compound was granted, after the usual process of planning considerations and investigations, including scrutiny for environmental impact. The detail of the planning scrutiny is not material but it is to be noted that this was against the background of Lagan, as the contractor, producing a Construction Environmental Management Plan or "CEMP", which was acceptable both to the States as employer and to the Planning Department, and which was to be adhered to. A copy of this, in the relevant version dated 15th January 2012, has been before the court. It laid down details of working methods to be used and precautions to be performed and observed by the contractor in order to protect the environment, archaeological and historical features, watercourses, ecology and other natural resources, and to regulate construction activities, including those in the Southern Compound.

18. There was a subsequent variation of the planning permission in respect of the Southern Compound, apparently (from the drawings) in March 2012. The variation arose because it had originally been proposed to locate the concrete batching facilities on a different site, actually on airport land adjacent to the car park, whilst two asphalt batching plants were to be erected in the Southern Compound. However, Lagan concluded that it could program the works to require the

use of only one asphalt batching plant. This freed up space in the Southern Compound to accommodate the concrete batching plant as well. This was seen as an improvement in the proposals, because it moved the concrete batching plant (an operation with an obvious tendency to produce dust) to a site further away from a vehicle paint shop, as well as from residential accommodation and a school, than under the original plan. A planning application was duly made, to vary the proposed layout of the Southern Compound accordingly, and was approved.

19. There was publicity in the Guernsey Airport Newsletter surrounding this, which Mr Birnie criticised stridently for being inaccurate and misleading. This was a matter which he put forward as a damning point against the States. His complaint was that the publicity stated that the Southern Compound was situated more than 100m from the nearest home, when his own measurement, taken with a tape measure (which he had preserved as an exhibit for the Court) from his son's bedroom window at the front of the house to the perimeter fence of the compound showed the distance to be 104 ft, a discrepancy of 66% and thus of such magnitude as to render the author of the statement a "liar". In fact, on an accurate reading of the publicity, it states that the *concrete batching plant* would now be more than 100m from the nearest home. Since the concrete batching plant itself was sited in the far north-west corner of the Southern Compound from the Birnies' property, this would seem to have been perfectly correct.

20. Mr Birnie also complained strongly at the time and at the trial of the alleged inadequacies of the environmental impact report, because it referred to flora, fauna, archaeology and suchlike but made no mention of the hugely more important question of human comfort. He also complained that the eventual works had been variations of the original approved plans when it was clearly said on the approvals that none was to be permitted. He further complained that what had been erected on the Southern Compound had not even accorded with the subsequent approved plans, with noxious plant being closer to his home than there shown.

21. However (and the Lt-Bailiff so directed the Jurats) these criticisms were of little or no materiality to the case. The very point of an environmental impact study is to consider the impact of proposed human activity on environmental elements such as flora, fauna and archaeology which have no voice, as the impact on humans is considered directly in the approval process itself. The rubric on the approved plans that no variation to the development works as shown on those plans was to be permitted referred to unauthorised variations, and did not prevent a variation sought and obtained by proper application. Lastly, whilst it appeared that the way in which the site had eventually come to be laid out by Lagan did not perfectly correspond to what was represented on the finally approved plan (in particular in that an internal roadway had been constructed on a route which short cut the northeast corner of that layout opposite the Birnies' property, enabling items - notably a bitumen container and a pile of concrete spoil - to be placed beside the boundary fence at this point), it is not self-evident that those differences were sufficiently significant as to amount to an unauthorised variation of the works within the scope of the permission. Moreover, the asphalt batching plant - the noise of which was the main source of complaint by the Birnies - was said in fact to be sited about 5m <u>further</u> from their property than shown on the approved plan.

22. On any basis, however, (and the Lt-Bailiff so directed the Jurats) complaints of flaws in process, or non-compliance with plans or procedures, are of no direct relevance to a claim in nuisance. In themselves, they do not cause any legal nuisance. The essence of a nuisance claim is that what the Defendants (ie the States) actually did or procured to be done on their property caused physical damage or disturbance to the Birnies on their property. It is the physical effects of what was actually done which give grounds for a claim, and it is irrelevant to this whether what was actually done was authorised by approved plans, procedures or processes, or was not. Unfortunately much of Mr Birnie's argument and cross-examination in the case was directed at making the above and similar criticisms, which were rather beside the point.

23. The timetable for the works on the Southern Compound was as follows.

    i. On **6th February 2012** work began to create the compound itself. An acoustic fence was erected around its perimeter, being 3m high on the north and west and 4m high on the south and east, where the nearest houses (including Vue de l'Eglise) were

located. It was a superior quality fence of the type designed to absorb noise, rather than merely reflect it. Top soil from the two fields was removed and stored, separately, at the south end of the compound, as were also the hedge banks. Special protective sheeting was laid across the entire area of the compound where the land was to be heavily used, as an anti-contamination measure. Hardcore, concrete and asphalt surfaces were then created on top of this, where needed. The required plant, storage bins, portable offices, etc were brought in. The main features were, first, the asphalt batching plant, which was sited slightly east of the centre of the compound, roughly opposite the Birnies' house, with large storage bins located to its west, second, the concrete batching plant and associated material bins, which were sited in the north west corner of the compound and, third, a concrete crushing plant, with an area for depositing concrete spoil from the airport, sited in the north east corner of the compound but extending south as far as opposite the Birnies' property.

ii. The main works commenced on **3rd March 2012**. Details of the operations are not material except to note that, apart from one or two week-end closures of the airport during the 18 month period of the works, the main repaving works were programmed to be done entirely in overnight sessions when the airport was not in operation. This involved working in sections, removing and carting away the old surfaces, laying the various layers of the new surface and cooling and rolling the new surface of that section in a single night, so as to have the section integrated back into the airport for operational purposes by the following morning. This scheduling therefore involved the asphalt batching plant in the compound starting up from about 5 pm each afternoon, Sunday to Friday, and then working continuously through the night until around 3am – 4 am the following morning. This plant incorporated what has been described as a "ski ramp" slope rising to about 8m in height, up which bins of prepared hot asphalt were raised on a conveyor system before engaging with the relevant mechanism to tip the contents from the top into waiting vehicles. Vehicles, including tipper trucks, were coming and going all night in connection with the works, as well as vehicles transporting materials, in particular bitumen and aggregate, during the day.

iii. Works to the actual runway were completed in **July 2013**, and to the aprons in **September 2013**.

iv. The last asphalt batching session was on **27th September 2013** and the last concrete batching session on **9th November 2013**.

v. Remediation works to restore the land began in **mid-November 2013** but were delayed somewhat owing to an exceptionally wet December.

vi. The fencing was removed in **March 2014**.

vii. Grass seeding was undertaken in **August 2014**. Trees and other landscape planting have also been carried out, although Mr Birnie did not think that all the former trees had yet been replaced, or replaced adequately.

24. The Birnies complain that the works briefly outlined above caused them nuisance in five different respects, namely light, noise, vibration, dust and smell. Some such complaints were recorded in the complaint log book kept by the contractors, as required under the CEMP (a copy of which was produced in the trial, as also was a Feedback Register), although this may well not record all instances of complaint actually made by Mr Birnie, as he has complained variously to the Ministers for Public Services (first Deputy Flouquet and latterly Deputy Luxon), to the Department of Environmental Health (Ms Val Cameron), and to the Client Project Manager (Mr Gerald Prickett). Although this case focuses on complaints by the Birnie family, the records show that theirs were not the only complaints received by the Project Management Team, which is hardly surprising.

25. In the early stages, in March 2012 the Birnies complained of floodlights on the site pointing directly into Richard's bedroom. This was remedied by repositioning and/or turning the lights in a different direction. They complained of the noise of the bleeping reversing alarms on vehicles in the compound, especially at night. This was remedied by the vehicles being fitted with white noise alarms instead, although Mr Birnie complains that this ought to have been done from the outset. In May 2012, it is recorded that Mr Birnie complained about dust on his property and damaging his pool filters, although when his property was inspected in response, those concerned thought this had been an overreaction, especially as the swimming pool had not been cleaned of winter debris. At the end of May 2012, Mr Birnie complained again about dust and excessive and intolerable night time noise.

26. The Birnies' main complaints recorded in the contemporaneous documents have been principally those of dust intrusion and noise, especially the intermittent banging of the asphalt plant "ski ramp" operation, continuing throughout the night, and interfering with sleep. Although less prominently they have also, and in particular Mrs Birnie at the trial, highlighted the intrusion of unpleasant smells, specifically of bitumen which was at its worst when this was delivered, twice weekly, to a huge container just inside the compound fence opposite the Birnies' house, and which Mrs Birnie said would linger unpleasantly and intrusively in the fabric of their old Guernsey farmhouse home, as well as preventing them sitting outside on their patio.

27. Following Mr Birnie's complaint to Deputy Luxon in early June 2012, a meeting was arranged between them, which took place on 26th June 2012 at the house. Deputy Luxon says that he was there to listen and try to understand Mr Birnie's position and then to consider it. He made some scribbled notes of his impressions immediately after the meeting, which were then typed up into a file note.

28. Deputy Luxon's note expressed his reaction, namely that, at the time, he could not himself confirm the validity of any of the complaints being made by Mr Birnie. He could not tell whether the undoubted dust was "general" dust, not inconsistent with the Birnies' domestic standards (he did not think the house was well kept) especially having regard to their owning dogs, or was dust migrating excessively from the compound. He thought that tests and monitoring needed to be carried out, both in the day and at night, to establish the severity (or otherwise) of the various matters of complaint.

29. Within the next few days, and as he had threatened at various times previously in the correspondence, Mr Birnie instructed advocates. Advocate Peter Ferbrache wrote to Deputy Luxon, who responded, conveying his views noted above, in a letter of 12th July 2012. He confirmed the offer to carry out monitoring checks and assured the Birnies that, if a nuisance was being created, the States would address this positively; however, at present this had not been verified, and until it was, the States could not consider paying compensation, or paying for the Birnies to move elsewhere, as was being suggested.

30. A fax sent from Mr Birnie to Advocate Ferbrache on 19th July 2012 and relied on by Mr Birnie, stated that the problems were worsening and suggested two alternative solutions. The first was for the States to purchase the Birnies' house from them, and then to rent it out and sell it again after the works were finished. The second was for the States to pay the Birnies' costs of renting alternative accommodation together with their removal costs and the costs of the interim upkeep of their house. Mr Birnie suggested that the former would be the cheaper option for the States.

31. The Birnies had, in the meantime, put Vue de l'Eglise up for rent. Mr Birnie said that they still wanted to purchase the property they had identified previously, and had decided that if they could rent out Vue de l'Eglise for a sufficient sum to pay the mortgage bond, then they would be able to finance this purchase. He also said in evidence that he was advised that he ought to try to rent out the property in any event if he decided to move out of the house, in order to mitigate his damages claim. In fact, a letting of the property was agreed during July 2012 to a Mr and Mrs Lloyd. It was documented on 14th August 2012, to take effect from 31st August, for just over one year, and the Lloyds paid a deposit of £2,900 (one month's rent) and an initial tranche of rent.

32. Mr Birnie continued making complaints during July and August 2012, variously as regards dust penetration, the untimely death of koi carp, pungent smells and night-time noise. He also complained about belching smoke, but this was identified as being harmless steam. Mr and Mrs Birnie made a diary of a "typical week" being that commencing August 10th 2012, and documenting, in particular, smells and disturbed sleep. In a letter addressed to Deputy Luxon and dated 14th August (the same date as the Lloyds tenancy was signed) Mr Birnie reiterated that with the problems being so bad, and continuing, he and his family were definitely going to move out of the property at the end of the month. However, the States remained unconvinced that the Birnies' complaints were justified rather than exaggerated.

33. During August 2012, special noise and dust tests were set up by RPS, the Project Manager employed by the States, using specialist consultants, Bureau Veritas. This was in addition to the general monitoring of noise which Lagan were carrying out nightly, as they were obliged to do under their contract. The dust monitoring test was to run for four weeks and was set up using a collecting pad on the rear patio of the property, with comparators set up in other locations off the property. Mr Birnie thought the test pad was "not in the best place" and so he moved it, thereby invalidating the first week's results.

34. The microphone monitor for the noise test was set up on a high pole above the *eleagnus* hedge and facing west towards the compound. The first week's noise monitoring results were received on 22nd August by the Project Team, and were also forwarded to Mr Birnie. They showed that although the CEMP target noise levels had not been exceeded materially during the day, they had frequently been exceeded by a significant margin (set at 10dB or more) during the night. Discussions with Lagan also showed that the primary cause was the asphalt plant "ski-ramp", and that there were no further noise mitigation measures which could be applied.

35. Mr Prickett therefore arranged to see Mr Birnie on 23rd August 2012. Explaining that the noise levels had turned out to be much higher during the night than anticipated, he said that in consequence, and given the stage of the project and that Mr Birnie had already said that the family had arranged to move out of the property in any event (Mr Birnie had so informed him in their telephone call on 22nd August), the States would agree to pay the Birnies' alternative accommodation costs whilst the asphalt plant was in operation, subject to verification of these, and they would also pay for the house to be cleaned after completion of the works and before the family moved back.

36. There is a dispute as to the effect of what was said. Mr Birnie is adamant both that he accepted this offer of accommodation costs, and that the offer included removal costs. He said that he had specifically told Mr Prickett "You've just made a grown man very happy" and it was this *bon mot* which enabled him to remember it so clearly. He was also adamant that the offer made by Mr Prickett was not conditional in any way. He regarded it as having been binding on the States, who had subsequently reneged upon it by refusing to pay his furniture storage costs and by trying to impose conditions, in particular that it was to be in full and final settlement of all his claims. The States had compounded this disgraceful behaviour by refusing to pay, when he had had the invoices for the accommodation which he and his family had occupied from 27th August 2012 sent on to them.

37. Mr Prickett says that Mr Birnie did not accept the offer, but said only that he would refer it to his Advocate, and would reply the following day. He (Mr Birnie) had referred to a letter sent the previous day from Advocate Ferbrache to Deputy Luxon and had said that there were many other issues to be resolved, including his claim for £360,000 compensation because the works had made Vue de l'Eglise unsaleable.

38. Advocate Hill on behalf of the States, suggested that Mr Prickett did not have authority to make a binding offer on behalf of the States, in any event. However, all this was really academic because Mr Birnie was not seeking to enforce the alleged offer as a contract. The Lt-Bailiff therefore directed the Jurats that they could well think it unnecessary to make any findings of fact as to what was said or agreed at this meeting, as the dispute was really a matter of evidence and surrounding circumstance only.

39. As from 27th August 2012, the Birnies moved out of the house and into a holiday apartment at Vazon, as they had previously arranged some time before 18th August, this being shown by an invoice for collection of their furniture. This was a far smaller property than their house, with fewer amenities, but Mr Birnie said that their options were limited because of owning two largish dogs, which many landlords would not accept.

40. As to Vue de l'Eglise, the Lloyds were due to move in on 31st August or 1st September 2012. However, when it came to it, they declined to take the property and did not move in at all, or at any rate not for more than perhaps a day. They claimed to repudiate the tenancy agreement owing to the condition in which the property had been left for them, with many of the Birnies' possessions still there, and on the grounds that they had been assured by Mr Birnie that any nuisance from the works in the compound had been resolved or at least ameliorated to tolerable levels, and that this was a misrepresentation.

41. This led to litigation between the Birnies and the Lloyds. The Birnies claimed unpaid rent for the tenancy, denying that the Lloyds were entitled to reject it; the Lloyds claimed return of their deposit and rent, asserting that they were. This action came before the Deputy Bailiff and Jurats in November 2014, and was decided in favour of the Lloyds on the grounds that the Birnies had not given vacant possession of the property in accordance with the requirements of the tenancy, and that this justified the Lloyds in repudiating the tenancy. In view of the pendency of this action, and the fact that it was not necessary to do so, the judgment did not make findings as to the alleged representation, and whether it was or was not a misrepresentation. It merely noted the Jurats' impression that even if such a (mis)representation had been made, the Lloyds had not placed reliance on it. There is, therefore, no finding directly material to this case arising from that judgment. However, parts of the transcript of the evidence given in that case by both Mr and Mrs Birnie were referred to by Advocate Hill in his cross-examination of them at the trial. This was to support a submission that, on the Birnies' own evidence in that case, there was no disturbance amounting to an actionable nuisance to the property at the time of the negotiations and the abortive letting to the Lloyds.

42. The Birnies did not subsequently re-let the house, and it remained vacant from then on. They stayed in the Vazon Bay apartment, subsequently moving to a cottage in the same complex, until they ultimately did return to the house, though only at the end of January 2014. Mr Birnie gave evidence that during this period they, and in particular he, visited the house frequently and regularly, needing to feed the fish in the pond, and also in order to give the dogs exercise in the gardens with which they were familiar. Mr Birnie said that he had slept over at the property in a sleeping bag on some occasions, but did not explain why; Richard Birnie could not recall any such occasion.

43. Mr Birnie got the landlord at Vazon Bay to send invoices for the accommodation to the States, via the Project Team (Mr Prickett). However, in the absence of any concluded agreement, the States declined to pay these invoices. Indeed, it is far from clear that they have yet been paid at all, although the expense has clearly been incurred. From the end of August 2012 and through 2013 there was further correspondence between Advocate Ferbrache on behalf of Mr Birnie and latterly Mr Birnie himself on the one hand, and the States (with the matter ultimately being referred to their Law Officers) on the other. As noted below, some such correspondence was marked "without prejudice" but as both sides wished to refer to it in the trial, that privilege has been treated as waived. There is nothing further within this correspondence which requires mention.

The proceedings and the trial

44. This action was commenced on 28th December 2012, by a professionally drafted Cause, complaining of nuisance by light, vibration, smell, dust and noise. It included a claim for general damages of £50,000 for impaired enjoyment of the property by Mr and Mrs Birnie and Richard. It made claims for special damage for the rent of alternative accommodation, removal and furniture storage costs, various other minor matters of additional expenditure caused by living elsewhere, and certain items of physical damage including damage to pool filters, broken window

panes, the death of koi carp and the cleaning of a drum kit. The total claim was £203,014, before continuing costs (principally rent) in the future.

45. The pleadings in the case have never been amended but during the interlocutory stages of the case Mr Birnie wrote letters stating that the Plaintiffs' claim had increased and included other matters such as medical expenses, legal fees, costs of gathering evidence and a hugely increased claim for general damages including damages for stress. Indeed, at times during the progress of the case, Mr Birnie recorded that the Plaintiffs' claim now exceeded £1M.

46. It is, of course, commonplace, in cases where damage accrues after the start of proceedings, for an updated schedule of losses to be used at the trial itself. The basis of this, though, is that it updates the quantification of sums claimed for heads of loss already intimated in the pleadings, and thus already part of the issues. Such updating is not an opportunity to bring in wholly new heads of loss, outside and not mentioned in the terms of the original cause, without seeking leave to make an appropriate amendment of the cause.

47. In the course of case management conferences before trial, Advocate Hill, on behalf of the States, stated that whilst he accepted that some procedural indulgence ought reasonably to be allowed to a litigant in person, he was making it clear that the scope of the action was defined by the applicable pleadings; he was neither willing, nor prepared, to deal with new claims that had not been pleaded against the States either at all, or in sufficient time and detail to enable them to be considered, examined and properly defended at the trial. This was a perfectly proper stance for the States to take. In order to ensure that there was no misunderstanding about the position, the Lt Bailiff therefore directed Mr and Mrs Birnie (in effect Mr Birnie) to provide, in advance of the trial, a final updated schedule of the damages or losses which the Plaintiffs were intending to claim at the trial, indicating where, in the pleaded Cause, this particular item of loss was mentioned or covered.

48. On consideration of the Schedule eventually produced from this exercise, the Lt-Bailiff ruled that several heads of alleged damage which Mr Birnie was proposing to claim were not permissible. Many items (such as legal fees, costs of reports, costs of making a DVD film) were not damages, but were the legal costs of the case itself and would fall to be considered under that head in due course, if appropriate. Other intended matters of claim were ruled inadmissible by the Lt-Bailiff on two grounds, namely that they were either not included in the existing pleaded cause at all (such as claims for medical expenses and damages for stress), and could not be introduced without amendment of the cause which would require an application which had not yet been made, or that they were, as a matter of law, too remote a consequence of the nuisance complained of to be recoverable at all (such as a claim that the inability to sell Vue de l'Eglise in 2011 had caused loss of its value, owing to the subsequent reduced demand for high value houses with the closing down of a local large employer). The Lt-Bailiff explained the reasons, and the procedural consequences of these rulings to Mr Birnie at the time.

49. A schedule of the remaining permissible items of loss was therefore prepared for the purpose of the trial and formed the basis of the arguments. It comprised the following items

Item		£
(1)	Rent	54,700
(2)	Removals (in fact including furniture storage)	9,700
	(reduced to £9,500 because of arithmetical error)	
(3)	New pump for swimming pool	500
(4)	New sand in pool filter	80
(5)	Cleaning of cars	500
(6)	Cost of dead Koi carp (11)	3,300
	(reduced to £3000 (for 10) at trial)	
(7)	Transfer of telephone lines	102
(8)	Redirection of mail	176
(9)	Extra cost of insurance for vacant property	216
(10)	Extra mileage and fuel	1,000

(11) Cleaning of exterior of house and patios	TBA
(12) Cleaning of carpets	TBA
(13) Cleaning of curtains	TBA
(14) Cleaning and transport of drum kit	4,000
(15) Loss of enjoyment of property – plaintiffs and son	450,000
Total:	524,274
	(reduced to £523,774 at trial)

Evidence and witnesses

50. The Plaintiffs case was presented by Mr Birnie. Understandably, as a lay litigant, he had difficulty distinguishing between material introduced correctly into the case as evidence in accordance with the rules of procedure and the directions which the court had given, and material which he wanted to refer to as part of his address to the court; he was accorded appropriate latitude in this regard.

51. The States had prepared the court bundles at the request of the Court, as the Birnies had neither the facilities nor the experience to enable them to do so satisfactorily. It had previously, and sensibly, been agreed between the parties that the bundles prepared for the purpose of the failed mediation attempt could serve as templates for the trial bundles. Those bundles had been prepared without the process of disclosure of documents having taken place. Their agreed inclusion of "without prejudice" material has been mentioned above. Issues arising between the parties with regard to documents which were missing from the bundles but would have been expected to be produced under standard disclosure, as well as the late introduction of any further documents, were dealt with individually as they emerged, taking into account the pragmatic agreement which had been made. In the circumstances, the absence of documents which might, in any other case, have been cause for criticism of a party's conscientious disclosure is not a criticism.

52. Mr Birnie was permitted to play a DVD recording which he had commissioned in October 2012 of the Southern Compound and the operations upon it. The DVD included a recording of the noise generated by the asphalt batching plant, recorded in the early evening. Unfortunately as Advocate Hill pointed out, this was not of great assistance because there was no calibration of the sound recording from which an assessment of the volume of the noise could be directly made. In addition, it had been made in the open, rather than inside the house for any comparison.

Witnesses of fact

53. Mr Birnie called three witnesses, namely himself, his wife and their son, Richard. Each gave evidence about his or her experience, and was cross-examined by Advocate Hill.

54. For the States, Advocate Hill called seven witnesses, all of whom were cross examined by Mr Birnie. Mr Colin Le Ray, the Airport Director, and Mr Gerald Prickett, a civil engineer who had been Client Project Manager overseeing the airport paving project work on behalf of the States, gave evidence with regard to the planning and the implementation of the project. They, and Deputy Paul Luxon, who had been Minister for Public Services from May 2012 and thus during most of the relevant time, also gave evidence about their dealings with Mr Birnie.

55. Advocate Hill also called four employees of Lagan, all of whom were civil engineers, and who had had various roles in the project. They were Mr Alan King, who had been the Planning and Technical Manager with regard to the civil engineering works, Mr Darren Fitzpatrick, the Construction Manager, Mr Steven Turner, the overall Project Manager, and Mr Christopher Halpin, who had assisted in developing the CEMP. They all gave evidence about the planning, implementation and oversight of the project and their own part in it, with focus on issues which had been identified from the cause as matters of complaint in this action.

56. The Jurats found all the States' witnesses of fact to be candid witnesses, conscientiously seeking to tell the truth as they saw it, and place weight upon their evidence accordingly.

57. Unfortunately, they do not have similar confidence in the evidence of Mr Birnie. Mr Birnie has a fixed and unshakeable belief in the righteousness of his case against the States, and that this must translate into a very substantial award of damages. He is also an intemperate man (as evidenced by the terms of some of his correspondence), and has a self-oriented view which leads him readily to make extravagant accusations, and to attribute mendacity, impropriety and motives of deceit to others just because something occurs which he does not agree with or like (such as, for example, his reaction to the airport publicity mentioned in Paragraph 19, and to the fact that poor photocopies of his photographs had been copied into the court bundle). The Jurats felt that these facets of his character had coloured his perceptions and had led him to exaggerate, to rationalise and to slant his evidence towards his case - albeit perhaps not to the extent of consciously telling an untruth. In those circumstances, the Jurats approach Mr Birnie's evidence with great caution and are hesitant about taking self-serving statements of his at face value unless they are either corroborated by other evidence or accord with common sense.

58. The Jurats have some, but fewer, reservations about the evidence of Mrs Birnie. She in fact gave very little evidence, and requested permission to go to her work rather than remain in court, except when her position as a co-Plaintiff really required her presence. She struck the Jurats as a basically honest person - her answers were not entirely favourable to her position - but was clearly under great pressure arising, the Jurats have no doubt, from the stress of being involved in litigation - which she clearly hates. Unlike her husband, she appeared to see some inconsistency between their position in the Lloyds litigation and in this litigation. This led to occasions where her evidence became strangely amnesiac or vague (for example that she simply 'did not know' why the family had moved back to the house only at the end of January 2014). However, the Jurats do feel able to give credence to her evidence about the effects of the works at the house, which they felt was quite genuine.

59. The Jurats had no reservations about the evidence of Richard Birnie, whom they found to be a clear, careful and intelligent witness, who gave candid evidence and demonstrated a commendably independent mind.

The expert evidence

60. Mr Birnie had previously stated that he intended to rely on two letter reports from experts contained in the court bundles, one of May 2013 from Dustscan Limited relating to dust, and one from Noise Consultancy Limited obtained in October 2012 (with a supplementary response dated March 2013) relating to noise, but that he was not proposing to call their authors to give evidence. Pragmatically, and whilst pointing out that these documents did not comply with the procedural requirements for the introduction of written expert reports, and that the dust report was even labeled a "draft", Advocate Hill said that he would not object to these documents being read and referred to, subject to his right to make submissions about their weight. That was therefore the course taken.

61. The Report of Richard Redwood C Eng, MSc, MIOA of Noise Consultancy Ltd, dated October 2012 examined the noise data available to Mr Birnie in October 2012 and concluded, applying BS4142 ("Method of rating industrial noise affecting mixed residential and industrial areas") that the likely increased noise levels over likely background noise were so great as to make complaints virtually certain to arise. The very brief Dustscan draft report of 24th May 2013 said little more than that samples of dust collected by Mr Birnie from his window sills in May 2013 appeared to be predominantly siliceous in origin but their source could not be confirmed and further tests were advised.

62. The States produced four Expert Reports prepared for the purpose of the case by Bureau Veritas, in respect of the dust, noise, vibration and light nuisances. Advocate Hill called three expert

witnesses to support these, as Mr Birnie had declined to release any of the experts from attendance for cross examination. With vibration and light not being seriously pursued at trial, the evidence of Mr John Carrington with regard to light nuisance took the matter no further than already noted in the outline facts.

63. The first significant expert was Dr Richard Maggs , who had approved the original report on dust nuisance impact prepared by Dr Yasmin Vawda in August 2013, but who no longer worked for BureauVeritas. Dr Vawda had been instructed to report on the period from April 2012 to August 2012, ie the period when the Birnies had been occupying Vue de l'Eglise. Her report was prepared from a site visit made in July 2013 and otherwise from available records and data supplied to her. These included the results of the four week dust monitoring exercise carried out by others in August 2012. Dr Vawda's report indicated, in restrained terms, that the CEMP measures with regard to reducing escape of dust were "on balance" the best practicable means for dust control at the time and appeared "largely" to have been adhered to by Lagan, and that insofar as further dust suppression steps might have been taken in the relevant time, they would, in her opinion, have had negligible effects, in the light of the recorded weather conditions. Noting that the level of dust collection during the four week dust monitoring test had only reached the level of "noticeable", her view was that the "risk of persistent dust nuisance from the Southern Compound at Vue de l'Eglise at the relevant time was "low" ". This was, of course, an assessment from interpretation of data and not from experience, and Dr Maggs was even further removed from the events than Dr Vawda. Cross examination did not take the matter much further, although Dr Maggs accepted that it would have been "better" if there had been more than just one dust collection test pad sited on the subject property itself for the purpose of the dust monitoring test.

64. Mr Paul Johnson, who held degrees in Environmental Health and Environmental Science and a post graduate Diploma in Acoustics and Noise Control, had been the author of the two reports, one on noise nuisance and one on vibration impact, both prepared in 2014. The noise report again considered only the period from April to August 2012. It reviewed noise monitoring records kept by Lagan in 2012 and the results of the specific noise monitoring also carried out in August 2012 at Vue de l'Eglise. Mr Johnson also commented on Mr Redwood's report of October 2012, expressing the view that this had used an inappropriate British Standard, the correct one being rather BS 5228, ("Code of Practice for noise and vibration control on construction and open sites") which gave the contractor greater latitude. (Dr Redwood's supplementary response to this point queried whether works of the duration of the airport works in this case could fairly be judged by a standard set for temporary works.)

65. Mr Johnson's written report concluded, again in less than enthusiastic terms, that Lagan had taken reasonable and practical steps to mitigate "*as far as possible*" the impact of noise from the site at Vue de l'Eglise, that the CEMP was adhered to, and that

> "*where noise limits defined in the CEMP were not and could not be met using Best Practicable Means (i.e. at night at the Birnie property), the next appropriate action was taken and the offer of compensation for temporary re-housing was made*".

66. Mr Johnson was an impressive witness, whose oral evidence with regard to interpreting noise data was helpful to the court, not least because it brought home that it would be very dangerous for lay people to seek to draw conclusions from noise data for themselves, relying merely on assumed logic, without expert assistance. For example, Mr Johnson enlightened the court as to the degree to which the human ear can perceive a recordable difference in noise volume, the effects, in human perception terms, of background ambient noise and of intermittent impulse noise as contrasted with steady noise, and the fact that the numerical increase in decibel (dB) measurements is on a logarithmic, rather than a straight line, scale.

67. Mr Johnson also drew on his prior 12 years' experience as an enforcement officer with various UK local authorities, and his familiarity with UK environmental health standards regarding persistent noise nuisance. Although these are UK Codes of Practice, the court found the comparison of some assistance. It noted Mr Johnson's evidence that 40 days was regarded as the

maximum duration of significant noise nuisance beyond which the local authority would require arrangements to be made to move out the sufferer, and it noted, in particular, Mr Johnson's unhesitating assessment that if, as an Environmental Health Officer, he had seen the reported data for noise nuisance in the context of the airport works which had been recorded in August 2012 with regard to Vue de l'Eglise, he would have insisted that the occupants be temporarily rehoused.

The law - general

68. This judgment now turns to the relevant law. With the Defendants acting in person as lay litigants, the Court has been dependent on Advocate Hill for submissions as to the applicable law in this case. His first submission was that, for the purposes of this trial, the law relating to private nuisance in Guernsey is identical to English law. No authority was initially cited for that proposition, and the Lt-Bailiff was not prepared to accept it as self-evident; Guernsey is a separate jurisdiction and system of law, and any convergence with English law, however convenient it may be as an assumption, requires some justification other than simply that this assumption is customary.

69. When pressed, Advocate Hill placed reliance on four matters. First, he relied on what is apparently the only reported case of nuisance in Guernsey Law, *Dadd v Guernsey Rifle Club* [1993] 15 GLJ 62 where a note states that the Deputy Bailiff (Carey DB) had directed the Jurats that

> *"the law relating to nuisance was similar to that in England".*

The case went to appeal (CA Civ Division 3 August 1994), on an argument of statutory authority (unsuccessful) and on the terms of an injunction granted (successful), without questioning this dictum.

70. Second, he relied on the well-known and often cited case of *Morton v Paint* [1996] 21 GLJ 61 (CA), a decision on occupiers' liability, an area of the tort of negligence. He submitted (as the Lt-Bailiff understood it) that this judgment supported the principle that where there was a gap in Guernsey tort law owing to a lack of case law which would have brought about judicial development, Guernsey law would look to English law for such development and would follow it - at least if there were no obvious and compelling reason to think that Guernsey law should be different.

71. Third, he relied on an article which subsequently became the first part of Chapter 24 of *The Laws of Guernsey (2003)* by Advocate Gordon Dawes. He relied on the opening general statement that

> *"The influence of English law on Guernsey tort law is profound, at least today…"*

referring back to *Morton v Paint*, and, whilst noting the author's warning that

> *"For all that English law is a powerful influence it is not an exclusive source, let alone a panacea for Guersney tort law…."*

he pointed out that the ultimate "principled hierarchy" of authority for determining the Guernsey law of tort which was suggested by the author placed English case law (and statute) second only to actual Guernsey law (and statute), and above Jersey case law, other common law jurisdictions and French law. He submitted that this supported the approach of taking Guernsey law to correspond to English law in this case.

72. Finally, he appealed to general pragmatism, submitting that the common and now time-honoured approach of Guernsey lawyers in looking to English law to provide the answer where there was no specifically recorded Guernsey law case, was practical and had the merit of providing easily discoverable answers to legal problems, and thereby also useful predictability and consistency in legal relations.

73. The Lt-Bailiff did not find this justification satisfactory. First, in the ***Dadd*** case, the point was not argued, and the learned Deputy Bailiff's direction to the Jurats was only that the law of nuisance in Guernsey was "similar" to English law, which is far from meaning "identical". That direction must any event be viewed in relation to the subject matter of that case; it did not even purport to state a completely universal rule. That subject matter was an injunction rather than damages, a permanent rather than a temporary alleged nuisance, and a plea of statutory authority. Similarly, *Morton v Paint* does not, in the judgment of the Lt-Bailiff bear the weight ascribed to it. It is not authority for a general rule of law that Guernsey law should be assumed to follow English law unless there is some clear reason made out for not doing so. It is authority, rather, for the narrower proposition that Guernsey law is not bound to follow English common law where this is plainly unsatisfactory, but will freely pursue and implement appropriate separate development and may serendipitously find that this development accords with a fair and reasonable result which English law (owing to its application of precedent) had to achieve through statutory intervention.

74. Moreover, there appear to be good reasons why the Guernsey law of nuisance cannot simply be assumed to be identical with the English law of nuisance by default, even for the purposes of this case.

75. The first reason appears as follows. In making an initial submission that no damages could be recovered by the Plaintiffs as a reflection of loss or damage suffered by their son Richard, because he was not a party in the action, Advocate Hill cited the English decision of ***Dobson v Thames Water Utilities and others*** [2009] EWCA Civ 28. That case certainly supports this point. However, it also confirms that *locus standi* to sue in nuisance in English law depends upon the claimant's having a proprietary interest in the land in question; mere occupancy is not enough. Thus, in English law, a tenant of land can sue in nuisance, because a lease confers such a proprietary interest, namely a "leasehold estate", but a mere licensee, even the spouse of the actual landowner, has no cause of action (see *Malone v Lasky* [1907] 2KB 141, affirmed as to this principle in *Hunter v Canary Wharf Ltd* [1997] AC 655.) However, since the concept of a leasehold estate is lacking in Guernsey law, where the interest of a tenant is purely contractual, the effect of applying this rule of the English law of nuisance would mean that a tenant in Guernsey would have no cause of action in nuisance, and would be relegated, as are those without proprietary interests in the United Kingdom, to a claim in negligence only. This would seem rather extraordinary. It would deprive the Guernsey tenant claimant of the benefit of strict liability where this applies in nuisance in English law.

76. Moreover, if the English law rule were applicable, it would actually mean that Mr Birnie himself has no cause of action in nuisance in this case, because the property is in the sole name of Mrs Birnie. When the Lt-Bailiff raised this point, Advocate Hill suggested that Mr Birnie's "matrimonial home rights" would be sufficient to give him an interest to sue. The Lt-Bailiff finds that proposition unconvincing, and it would in any event produce unsatisfactory anomalies for persons not married . It was not examined further, and it is not worth doing so. The real point, for present purposes, is simply that it demonstrates that an unquestioning assumption that the Guernsey law of nuisance is identical with the English law of nuisance is not a reliable basis for an exposition of all features of the Guernsey law of nuisance.

77. The second, and the main, reason which causes the Lt-Bailiff to question the validity of such an approach, however, is the nature of claims in nuisance. The law of nuisance governs obligations and rights between landowners or occupiers, arising out of their landholdings. It has developed, therefore, out of land law, and in that historic context. The English law of nuisance, governing "neighbour relations" in a physical sense arising from land-holding, preceded the clear establishment in English law of the general tort of negligence, with its famous use of the word "neighbour" in the personal and metaphorical sense of the dictum of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562. Similarly, Guernsey land law is and was based on the coutume of Normandy and civil (French) law principles, and the Guernsey law of nuisance will have developed out of that, and with the influence of that origin and context.

78. In fact, this is specifically recognised in Dawes' *The Laws of Guernsey (2003)* in Chapter 1 "The Sources of Guernsey Law" (p 12), where it is stated

> *"The influence of the English Common Law is particularly strong in the context of tort"*

but a footnote reads:

> *"With the probable exception of nuisance where French and customary law would be relevant."*

In further commentary at pages 14-15 and a footnote, it is noted that whilst Guernsey law might choose to follow English law's current tendency to assimilate nuisance with negligence by introducing standards of reasonable care and reasonable foreseeability,

> *"…it may be that for policy reasons a Guernsey Court would prefer to adopt or retain stricter liability between landholders. In this it might be influenced by modern French law where the criteria[sic] is exclusively that of whether the activity exceeds the level of inconvenience between neighbours which, in all the circumstances of the case, must be accepted as a normal incident of living in proximity to others." [Liability arises where there is "un trouble anormal de voisinage" regardless of fault.]*

79. It is not surprising that civilised systems of law should come to recognise similar broad principles of legal rights and responsibilities. However, when it then comes to applying these to detailed situations, they may perfectly well reach different answers in particular aspects, and this is all the more possible where the law has to strike an appropriate balance between competing rights and interests of individuals. That is the position with regard to nuisance, where the right of one occupier of land to do whatever he may (lawfully) choose on his own land clashes with the right of another occupier to enjoy his own land without annoyance or disturbance. For that reason, the Lt-Bailiff has felt it necessary to examine critically the submissions of Advocate Hill, deriving only from English law, since Guernsey law is free, possibly to come to its own conclusions as to where the balance between such competing rights is properly to be drawn, bearing in mind the possibility of different emphasis noted in Paragraph 78 above.

80. In this regard, the Lt-Bailiff derived assistance from an article entitled "*Voisinage* and Nuisance in the Law of Jersey" by Rebecca MacLeod, at [2009] J&GLR 274, and the source references there given. Whilst the article examines the principles of the parallel doctrines of *voisinage* and nuisance as they have developed in Jersey law, and the separate doctrine of *voisinage* has not been recognised in Guernsey law, the article also notes the (relatively unclear) position of Guernsey law, and provides helpful background references to the principles in this area of law deriving from French and Civil law origins.

Principles of liability

81. As already noted, Advocate Hill did not seek to argue that Mr Birnie lacked title to sue in nuisance, and the Lt-Bailiff accepts this, holding that the right to sue depends on the right of enjoyment of the property in question, and consequent damage to that right. (In fact, even if Mr Birnie had no cause of action in nuisance through having no legal interest in the land itself, this would make no ultimate difference to the outcome of the case as Mrs Birnie, who is a party, would have full title to sue.)

82. Advocate Hill's propositions as to the principles of liability based on English authority were then as follows.

(1) A person is entitled to do anything on his own land which he may lawfully choose to do and his conduct only becomes a (private) nuisance, when its consequences interfere with the land of his neighbour by

a. causing an encroachment or

b. causing physical damage to it or to buildings, works or vegetation upon it, or

c. unduly interfering with his neighbour's comfortable and convenient enjoyment of his land.

See Clerk & Lindsell *Law of Torts*, 20th Edition para 20-26. In the present case, the court is primarily concerned with (c).

(2) It is always a question of fact and degree whether any interference with such comfort and convenience alleged by the neighbour is so serious as to be held to amount to an actionable nuisance at law. In particular,

a. the test is objective, and the seriousness must be judged by the standards of the reasonable person and not merely the subjective assertions of the Plaintiff and

b. breach of some arbitrary measure or limit is not in itself necessarily proof of actionable nuisance.

See *Murdoch v Glacier Metal Co Ltd* CA (Unreported) The Times 21 January 1998)

(3) Building or construction works are a special case because that is accepted to be a reasonable use of land, but inevitably to cause some degree of temporary irritation annoyance or inconvenience to neighbours ("mere annoyance" for short). It is a matter of fact and degree, whether this goes beyond what must reasonably be tolerated and becomes an actionable nuisance.

(4) Even if it does, provided that such works are carried out with all reasonable and proper steps being taken to ensure that no *undue* inconvenience is caused to neighbours, there will be no liability in nuisance: see *Andreae v Selfridge & Co* 1938 Ch 1.

> *"A man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next door neighbours during the process of demolition; but he is not responsible as for a nuisance if he uses all reasonable care and skill to avoid annoyance to his neighbours by the works of demolition".*

per Vaughan Williams J in *Harrison v Southwark and Vauxhall Water Co* 1891 2 Ch 409 at 413-4.

(5) The better analysis is that the taking of all such reasonable steps provides a defence to a claim in nuisance once a sufficient nuisance is made out, rather than its absence being a matter for the claimant to prove as part of that nuisance. The burden of proof of such steps is on the defendant: *Hiscox Syndicates Ltd v Pinnacle Ltd* [2008] EWHC 145 (Ch) at [30]:

> "*If what would prima facie be a nuisance is established, in order to relieve himself from liability the alleged tortfeasor should take all proper and reasonable steps to avoid it."*

(6) In such a case the perpetrator is only liable in respect of the *additional* inconvenience or discomfort caused by the want of such reasonable steps; it is only that feature which makes the nuisance "*undue"* or "*excessive":* see the basis of the successful appeal in *Andreae,* where the first instance judge found that demolition works had been carried out without taking such reasonable steps, but had awarded damages reflecting the effects of the works in general. These were reduced to compensate merely for the effect of the unreasonable *additional* nuisance.

(7) With regard to what constitutes "all reasonable skill and care to avoid annoyance to the neighbours", this is also a matter of fact and degree: see *Andreae v Selfridge &* Co at [1938]1 Ch p 10, which recognises that

> *"…..it would be unreasonable to expect people to conduct their work so slowly or so expensively, for the purpose of preventing a transient inconvenience, that the cost and trouble would be prohibitive. It is all a question of fact and degree…"*

(8) Furthermore, the reasonableness of the purpose or object of the works is also relevant to whether any actionable nuisance should be held to have occurred:

> *"Nor is he liable to an action even though the noise and dust and the consequent annoyance be such as would constitute a nuisance if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness, or in the execution of works for a purpose involving a permanent continuance of the noise and dust. For the law, in judging what constitutes a nuisance, does take into account both the object and duration of that which is said to constitute the nuisance."*

See *Harrison v Southwark and Vauxhall Water Co [ibid]*.

Thus, he submitted, the more meritorious the purpose of the building works, the greater the latitude allowed to the defendant with regard to what must be tolerated by a neighbour before a liability in nuisance is incurred.

83. Applying these propositions to the facts of the case, Advocate Hill submitted as follows:

(1) On the evidence, the Birnies had not proved that they had in fact suffered any annoyance, etc, sufficiently serious as to amount to an actionable nuisance in law, at all. The evidence showed no more than the low level of nuisance ("mere annoyance") which was the inevitable consequence of nearby construction works, and which a neighbour could be reasonably expected to tolerate.

Advocate Hill pointed, in particular, to Mr Birnie's evidence in the *Birnie v Lloyd* litigation, to the effect that when the tenancy was being negotiated, (June/July 2012), any such issues of annoyance had been "resolved" meaning, at least, ameliorated to a tolerable level. The works had not changed after that time. The court should infer that that was the reality of the situation, and find that no discomfort or annoyance amounting to actionable nuisance had been caused or suffered, and the Birnies had moved out of the house for other reasons, in particular the plan they had already formulated in order to try to purchase another property.

(2) If that were not accepted, and nuisance beyond such "mere annoyance" was found to be proved, then the States had used all reasonable skill and care to avoid causing such nuisance, and this afforded a complete defence to the Birnies' claim.

He submitted that the evidence showed the States to have taken all reasonably practicable and proper steps in this regard throughout. The practical options available were limited by the constrained size of the airport property, the proximity of residential properties in all directions, and the imperative of carrying out the project with minimal disruption to vital airport activities. In the planning of the works and their logistics, the States had had to select the "least bad" option generally, and that decision had been reasonable. With regard to the nuisance which the selected option then might have caused, the steps taken in and about the manner of carrying out the works had been carefully devised with a view to minimising any nuisance. As examples, he referred to devising the CEMP and insisting on its implementation, the taking of voluntary steps such as using an acoustic fence which was both higher and of superior standard than the norm, using finer than normal filters on the concrete batching plant, and adopting and implementing a policy of quick and positive response to investigating, dealing with, and resolving complaints. He submitted that this had all been applied in the particular case of the Birnies, such that the defence of "all reasonable avoiding steps taken" was made out.

(3) As part of, or in addition, to the above, if the court were of the initial view that there had been a nuisance and that there were other possible steps which could have been taken to mitigate this, the court should find as a fact, and take account, that

(i) the works in question were not being carried out for private benefit or gain but for vital public benefit, and

(ii) no further mitigation measures were financially practicable in the context of keeping the airport functioning in the vital economic interests of the island.

If otherwise inclined to hold in favour of the Plaintiffs, the court should instead hold that these additional factors were sufficient to give the States a good defence to the claim.

(4) Lastly he submitted that the key underlying basis of liability for nuisance was, in effect, a finding of a lack of reasonable conduct on the part of the defendant. The States ' offer to pay the reasonable costs of alternative accommodation for the Birnie family during the continuance of any suggested nuisance was, he submitted, to be treated, as being a reasonable step in taking care to avoid "undue or excessive" nuisance to them, and this therefore either supported the States' defence, or in itself provided an additional ground of defence

In answer to questions from the court, Advocate Hill confirmed his submission that it was the making of that offer – which was not suggested to be other than genuine - which was the reasonable step on which he relied. The fact that those costs had not in fact been paid was (he submitted) not material, as this had, in any event, arisen through Mr Birnie's refusal to agree a sensible way forward.

Conclusions on law

84. The underlying principle of liability in nuisance, as appears from both English and Civil law sources, is one of striking the proper balance between the right of one occupier of land ("D") to do anything lawful on his own land as he chooses, and the right of a neighbouring occupier of land ("P") not to be unduly disturbed in the enjoyment of his own land by D's activity. It is the word '*unduly*' which introduces the value judgment of where the balance is to be struck in any particular case. That balance is a function of five elements, namely

(a) the general character of the particular neighbourhood, which sets a standard for the degree of everyday disturbance associated merely with occupying land in that locality and having neighbours;

(b) the reasonableness of the use of land by D which gives rise to the complaint of nuisance;

(c) the reasonableness of the steps taken by D to avoid causing such nuisance;

(d) the severity of the nuisance being complained of by P;

(e) the duration of the nuisance being complained of by P.

85. Against this background, the Lt-Bailiff accepts Advocate Hill's propositions of law at paragraph 82 (1) - (8) as correctly stating the law of Guernsey as it specifically applies to a claim for damages for nuisance caused by construction operations, but with some qualifications as to the extent of their effect. With regard to principle (8) (ie the weight which can properly be attached to the public or similarly selfless purpose of the works) she holds that as a matter of law, this is not a matter which adds to the point that construction works are intrinsically a reasonable use of land. In the case of public works, the power authorising them may well provide a defence of statutory authority against such a claim, but absent any such defence it is not to be supposed that any different considerations should apply to a nuisance caused by public works than by private works. Indeed, the public benefit may even militate in favour of the Plaintiff as regards an

entitlement to damages because it would seem intrinsically unfair that the public at large should gain a benefit at the expense or detriment of an individual, without making fair compensation for this.

86. However, the Lt-Bailiff notes a difficulty which these stated principles do not resolve. This is the case where a severe degree of nuisance is found to be caused, but either there are no possible steps which could be taken to mitigate it, or the only possible steps are said, with apparently good reason, to be impracticable, either physically or, and more likely, for financial reasons. This highlights the potential difference between an approach favouring strict liability or only fault based liability. It raises the question whether there are limits to the principle at Paragraph 82 (7) above. The Lt-Bailiff is satisfied that as a matter of law (and certainly applying to a claim for damages for nuisance by construction works) there are such limits. Applicable at the extreme she holds the following principle to apply:

    (9) If a nuisance caused by construction works is sufficiently serious as reasonably to render continued occupation of P's property intolerable, then D will be liable whether or not D took all reasonably practicable steps to avoid causing nuisance.

87. Therefore, with regard to Advocate Hill's submissions as to the application of the appropriate principles in this case recorded at Paragraph 83 above, the Lt-Bailiff accepts that the first two issues arise and will pose questions for the Jurats accordingly. With regard to the third proposition she will pose questions for the Jurats with the qualifications noted above.

88. However, the Lt-Bailiff rejects the fourth proposition in point of law. She holds that an offer of alternative accommodation is not capable, in law, of being material to the issue of liability in nuisance. It is nothing to do with whether a relevant degree of nuisance has in fact been suffered by the plaintiff. Neither is it relevant to the issue whether reasonable steps were taken by the defendant to prevent that experience occurring. Any other result would, in effect, enable a defendant to buy his way out of liability. Such an offer may be relevant as to whether an injunction ought to be granted, but that is a different issue.

89. The Lt-Bailiff therefore directed the Jurats that they should consider and answer the following questions with regard to the issue of liability for nuisance:

    (1) Did the Plaintiffs suffer interference with their enjoyment of Vue de l'Eglise from the works in the Southern Compound which exceeded the level of inevitable annoyance or inconvenience caused by nearby construction works which an ordinary reasonable person could be expected to put up with?

    (2) If so what was the nature and degree of such nuisance or interference, and over what period of time had it been sustained? The Lt-Bailiff directed the Jurats that they could come to different conclusions with regard to different periods.

    (3) In respect of any such nuisance found in answer to Question (2), had the Defendants nonetheless taken all proper and reasonable steps, to avoid causing such nuisance to the Plaintiffs? Were there any possible steps which could have been taken but which were not taken? Was it reasonable (or not) not to take them?

    (4) Was the degree of any nuisance found to have been caused to the Plaintiffs so severe that an ordinary occupier of Vue de l'Eglise might reasonably have found it intolerable to remain in occupation whilst it continued?

    (5) What were the reasons why the Birnies vacated Vue de l'Eglise on or about 27th August 2012 and did not return until the end of January 2014?

90. The Lt-Bailiff further directed the Jurats that in answering the above questions, they should bear in mind the five aspects mentioned in Paragraph 84 above and any other circumstances which they found material. They should have regard to the general character of the neighbourhood of

Vue de l'Eglise and the standards of comfort which were objectively to be expected in such neighbourhood. They should apply the standards of the ordinary reasonably minded person of average sensibilities, living in the Guernsey community. Their conclusions as to nuisance should be based on the total impact of the various matters of nuisance complaint which they found, although they would no doubt look at these individually as part of their deliberations. They should consider the evidence before them as a whole.

91. Depending on the Jurats' answers to these questions, the Lt-Bailiff would rule on the question of liability in the claim, and if then appropriate, direct the Jurats on issues with regard to determining the appropriate quantum of damage.

Findings of fact regarding alleged nuisance

92. The Jurats preface these findings by commenting that Guernsey is a small and densely populated island, such that occupiers and residents will often be affected, to some degree, by the activities of their neighbours. It is the Jurats' view that part of the culture and ethos of Guernsey is that neighbours are reasonable in their 'give and take' with regard to such matters, and this is particularly so with regard to activities which are of benefit to the community. However, they would also think it part of the ethos of the Guernsey community that an individual should not have serious inconvenience imposed upon him individually for the benefit of that community without appropriate recompense. Against this background they turn to the questions posed by the Lt-Bailiff.

(1) Did the Plaintiffs suffer interference with their enjoyment of their property from the works in the Southern Compound which exceeded the level of inevitable annoyance or inconvenience caused by nearby construction works which an ordinary reasonable person could be expected to put up with?

93. The Jurats find that the Plaintiffs did suffer such degree of *prima facie* nuisance. They find that this was caused by the combined effects of noise, smell and dust, but principally and significantly by the effects of noise. They reach this conclusion as follows:

Light

94. The Jurats are satisfied that the initial annoyance to the property caused by badly positioned floodlighting was remedied after a complaint was raised. An initial annoyance of this kind, which is then remedied reasonably promptly upon complaint is, the Jurats find, within the bounds of what a reasonable person can be expected to put up with from nearby building works. Although Mr Birnie and Richard suggest that more than one complaint had to be made, the Jurats are not satisfied that this made the initial annoyance undue or excessive.

95. Mr Birnie accepted that this annoyance had been remedied well before July 2012. No subsequent complaints of light nuisance arise, and this needs no further consideration.

Vibration

96. The only complaint with regard to vibration is contained in a general comment in Mrs Birnie's witness statement, where it is coupled with noise, to which it is obviously closely allied. An allegation in the Cause that two window panes in the house were cracked by vibration has not been pursued. The Jurats do not find any nuisance by vibration to have been proved.

Smell

97. This concerns the smell of bitumen. Mr Birnie did not complain of this in his witness statement, but did so in his oral evidence, stating that it pervaded the house because of the old materials of which this was constructed. Mrs Birnie gave evidence that this smell was persistent and pervasive, occurring generally twice a week and enduring for a couple of days, whenever a large bitumen container, placed immediately inside the acoustic fence opposite their property was

filled; the smell prevented their using their patio area and pool as well as penetrating the house. She noted it on the 'typical week' diary document for Saturday and Sunday 18th and 19th August 2012. Richard Birnie mentioned the smell of bitumen as one reason why he could not open his bedroom window.

98. The smell of bitumen may offend persons to differing degrees, but it is generally regarded by the ordinary person as unpleasant. The evidence about the bitumen smell in this case is somewhat sketchy, but the States' evidence did not contest that the odour of bitumen was likely to have spread to the Birnies' property. Assessing the Plaintiffs' evidence, the Jurats are satisfied, on balance, that owing to the length of time during which it continued, the repetitive smell of bitumen exceeded that which a reasonable person could be expected reasonably to endure from nearby construction works, and this therefore was a sufficient, although not particularly severe, degree of nuisance. There was, in consequence a *prima facie* nuisance here, albeit not to a particularly severe degree.

Dust

99. The direct evidence relied on by the Birnies in support of this aspect of the case is their own oral evidence supplemented by various photographs, including several of cars, external windowsills with writing on them, paving by their swimming pool, and the most striking being a photograph showing an apparent abstract pattern created by the removal of objects from a mahogany sideboard top. In addition, and as mentioned, the court inspected a cymbal and drum brought to court as an exhibit to demonstrate dust deposits. Mr Birnie referred to the draft Dustscan report and also to a picture of concrete spoil just inside the fence of the compound opposite his property, with a JCB digger on top (visible well above the height of the acoustic fence) which he said was the site for breaking up and crushing concrete.

100. The Defendants deny that any appreciable dust nuisance occurred. They refer to the dust suppression measures, such as fine filters and damping down of stores and bins, which they say were applied to the works. They point to the conclusions of Dr Vawda regarding the dust analysis undertaken in August 2012. There was oral evidence that the JCB on the concrete spoil pile was only sorting the pieces and lifting them down to the actual crushing plant, which was at ground level inside the compound, with both the pile and the fence shielding the Birnies' property from it.

101. The Jurats note that the dust analysis of samples taken in August 2012 and referred to in Dr Vawda's report is neither conclusive as to the source of the dust being extensively from the Compound as opposed to other sources such as agriculture, and that in any event it categorises the detected intrusion of dust as merely "noticeable". Whilst it might indeed have been better to have had evidence from monitors at other positions on the property, they do note that the relevant test pad was placed on the Birnies' patio area, which would reasonably have seemed to be the primary area of their outside enjoyment. Despite Mr Birnie's strenuous urgings, they cannot accept that the photographs are really conclusive evidence of excessive dust intrusion. There is no evidence of the length of time over which the dust shown in any photograph had accumulated, and this also applies to the dust on the drum kit exhibit. With regard to the concrete crusher, they note that the photographs were taken in June 2013, after the house had become unoccupied, and Mr Birnie's angry letter, by which he sent this photograph on to Lagan, suggests that it had been built up later in the course of the project.

102. On balance, therefore, the Jurats are not satisfied that the extent of dust penetration on or into the property from the works in the compound was so excessive that it could not have been dealt with to reasonable standards by more frequent dusting or use of a car wash. This dust was not, they find, an excessive degree of nuisance on its own, although it has some weight in their assessment of the overall degree of nuisance which the property sustained from the construction works.

103. With regard to the period subsequent to August 2012 the Jurats find it more likely than not that the dust situation deteriorated. Notwithstanding the Defendants' witnesses' explanations with regard to the concrete crushing function, they are satisfied that, being above the height of the acoustic fence, these activities would have increased the escape of dust from the compound,

although they cannot say by how much; they also observe that with the Birnies having vacated Vue de l'Eglise, there would have been less pressure on Lagan in this regard.

Noise

104. The Jurats are perfectly satisfied that the degree of noise nuisance to Vue de l'Eglise from the compound did amount to an excessive nuisance, which the reasonable neighbour of construction works could not reasonably be expected to tolerate, by reason of its intensity and anticipated duration.

105. Whilst noise nuisance from the reversing alarms on vehicles was, they find, promptly dealt with similarly to the initial light nuisance, they are satisfied that serious noise nuisance was constituted by the noise of the "ski ramp" asphalt batching plant, which operated throughout the night, six days a week, at a height above that of the acoustic fence around the compound. This therefore formed no effective barrier. The Jurats do not find it helpful to scrutinise the scientific noise measurements in detail; they do find themselves generally satisfied that the noise generated by this plant was not only well above the general night time noise levels of this neighbourhood outside airport operating hours, but spiked to even higher levels. The Jurats note that the recorded noise level on Vue de l'Eglise was found to exceed the additional 10dB leeway above which the CEMP requirements stipulated that the relevant activity should stop. They also note from the expert evidence, (which accords with common experience) that this noise would have had increased nuisance impact because of its irregularity and percussive impulse character.

106. The Jurats therefore find that the degree of noise disturbance which they are satisfied would have occurred once the asphalt batching plant came fully on stream for the project was outside the bounds of what an ordinary average person might reasonably be expected to put up with as mere annoyance from neighbouring building works - certainly if it continued, as it did, for more than a relatively short and defined period. Decent sleep is a fundamental human need and any significant interference with this is a serious interference with enjoyment of residential property.

107. The Jurats therefore find a *prima facie* nuisance to be proved in this respect alone, but certainly, and in any event, from the aggregated effects of noise, smell and to some degree dust.

(2) What was the nature and degree of such nuisance and over what period of time was it sustained?

108. The nature of the nuisance found appears above; it was constituted seriously by noise, and moderately by smells, augmented by the lesser element of dust.

109. The Jurats find this nuisance to have operated from May 2012 and that it continued through until after the asphalt batching operation ceased in September 2013, and the intensity of the construction operation was winding down. They are quite satisfied that such nuisance was occurring during August 2012 and had therefore been constituted prior to that time. They are equally satisfied that the relevant degree of nuisance came about only after the asphalt batching plant had become fully operational, which was no earlier than March 2012.

110. As to when, between these dates, they should find that truly excessive nuisance began, the Jurats have considered the evidence of Mr Birnie. He said that his statements to the Lloyds in June or July 2012 that major issues associated with the compound had then been at least ameliorated to tolerable levels were true, that his evidence, now, that in August 2012 the degree of nuisance was sufficiently intolerable as to "force" the family to move out was also true, and that the reconciliation of this was that things had worsened in between. The Jurats regard that as implausible and they do not accept it. They note Mrs Birnie's agreement in her evidence, that Mr Lloyd had not been told the truth. They find that to have been the case.

111. Allowing for an initial period for the works operations to come fully on stream and a degree of initial tolerance before the fortitude to be expected of the reasonable person would be exhausted, especially in the knowledge of the nuisance continuing, the Jurats find that the necessary degree

of excessive nuisance would have been established by May 2012. They find it to have commenced then.

112. As to the cessation of the nuisance, the Jurats are satisfied that this would have occurred by the end of the concrete batching operations on 9th November 2013.

(3) Did the Defendants take all reasonable and proper steps to avoid any such nuisance to the Plaintiffs? Were there any possible steps which could have been taken but were reasonably not taken?

113. The Jurats are satisfied that the Defendants did take all proper and reasonable steps to avoid causing the nuisance to the Plaintiffs, in the sense that all practicable steps, as the States and Lagan saw them, were considered and were taken. However, there were other possible steps which were not taken.

114. Having reviewed all the evidence with regard to dust, insofar as relevant, the Jurats are satisfied, that all reasonable steps were taken to avoid or minimise the escape of dust in the direction of the Birnies' property, at least until after the Birnies had vacated it, by laying down and implementing appropriate dust suppression measures.

115. With regard to the smell from bitumen, Mr Birnie suggested that the bitumen tanker could and should have been placed further in to the site rather than immediately inside the boundary fence opposite his property. However, the Jurats were not satisfied that placing the tanker any further into the compound would have made any practical difference to the extent of the smell of bitumen carried on to the Birnies' property, nor that there was any other position where the bitumen tank could practicably have been placed which would have had this effect.

116. With regard to the noise nuisance, the Jurats noted from the evidence that when the degree of noise nuisance to the Birnies' property was appreciated, at the site meeting of 22nd August 2012, Lagan stated that there were no further noise mitigation measures which could be taken in this regard. Given that the "ski-ramp" operation was higher than the acoustic fence, and that the evidence shows that the fence could not be increased in height owing to instability and wind effects, the Jurats find that to be the case. They therefore find that all proper and reasonable physical operational steps to avoid this nuisance to the Plaintiffs had been taken.

117. However, the Jurats find also that there was one further step which could have been taken. This was not to carry out such noisy operations during reasonable sleeping hours. Such a step, although possible, was not taken because it would have required the closure of the airport, with unacceptable economic consequences for the Island. The Jurats find that the States of Guernsey did regard, or would necessarily have regarded, taking this step as unacceptable and therefore impracticable for that reason. The Jurats also find that this decision was reasonable, especially in conjunction with the offer which was made to the Plaintiffs to meet their reasonable costs of alternative accommodation.

(4) Was the degree of any nuisance found to have been caused to the Plaintiffs so severe that an ordinary occupier of Vue de l'Eglise might reasonably have found it intolerable to remain in occupation whilst it continued?

118. The Jurats find that it was. Having carefully considered the totality of the evidence, and applied the standards of the ordinary reasonable man of normal sensibilities, they find that the extent of sleep deprivation alone coupled with the anticipated duration of that nuisance, was such that the reasonable occupier would have been justified in taking that view. This is all the more so when the effects of smell and, to a degree, dust are added and also taken into account. They note, and were impressed in particular by, the independent evidence of Mr Johnson with regard to the noise nuisance, namely that with the results recorded in the noise monitoring tests at the property, and the potential duration of that noise, it should, in his view, have been an immediate requirement that the occupiers in question were moved out of the property.

(5) What were the reasons why the Birnies vacated Vue de l'Eglise on or about 27th August 2012 and did not return until the end of January 2014?

119. The Jurats find that the Birnies vacated Vue de l'Eglise for a combination of reasons, being, in part, because they believed that they had secured the anticipated letting to the Lloyds and in furtherance of that, but also because of the impact of the nuisance which they were in fact suffering from the construction works. They are satisfied that this latter reason was a substantial underlying reason for their vacating, and that the letting to the Lloyds was seen as a fortunate and convenient means of achieving this, by fitting in with this objective with obvious financial advantage. They are, on balance, satisfied that the Birnies would have vacated the property at about the relevant time, in any event.

120. The Jurats are also satisfied that the only reason why the Birnies did not return to the property, certainly once it became apparent that the States was not simply paying their accommodation costs was, likewise, the effects on them, and Mrs Birnie in particular, of the nuisance. This supports their finding as to the strength of this as the original reason for the Birnies' moving out.

121. As to their return, the Jurats find the evidence somewhat sketchy and unsatisfactory. They would have expected that any family would have been anxious to return to their home prior to Christmas. The Birnies were not strongly pressed on this point in cross examination, but in all the circumstances, the Jurats are not prepared to accept that the Birnies returned to the property at the first reasonable time when they could both be satisfied that the nuisance had truly ceased, and make sufficient practical arrangements to do so. Mr Birnie was, on his own evidence, visiting the property frequently, and the Jurats are satisfied that it must have been obvious by October/November 2013 that the works which were causing the real nuisance were winding down. There has been no evidence as to the terms of letting of the alternative accommodation, and Mr Birnie said that when the family did leave, the landlord accepted to charge only for the time they had actually occupied. Taking all the evidence, the Jurats are satisfied that the Birnies reasonably should have been able to, and should have, terminated their accommodation and returned to Vue de l'Eglise at the end of November 2013.

Conclusions on liability

122. In the light of the Jurats' findings above, the Lt-Bailiff holds that the Birnies succeed in establishing their case on liability against the Defendants. She does so on the grounds that a degree of nuisance beyond that which must reasonably be tolerated from lawful construction works on neighbouring land has been found to have occurred, and that the Defendants do not establish the defence of having taken all reasonably careful and skilful steps to avoid causing such nuisance. This latter is either because some such possible step (namely ceasing to carry out the noisy works at night) was not carried out, or alternatively, and the Lt-Bailiff prefers this analysis, because the defence of "reasonable steps" is not available in Guernsey law in answer to a claim for damages where the degree of nuisance being caused is so severe as to make continued normal occupation of the Plaintiff's property intolerable by reasonable standards.

Quantum

123. If the Defendant's defence on liability failed, Advocate Hill made the following general submissions with regard to the legal principles to be applied in assessing the quantum of damage.

124. The purpose of the award of damages is to place the Plaintiffs, so far as money can do so, in the same position as they would have been in if the relevant wrong to them had not occurred. That wrong was an interference with their reasonable enjoyment of the amenity of the property which they occupied ("loss of amenity value").

125. English case law shows that such damages are not to be equated to damages in negligence cases, in particular personal injury cases, awarded for "pain, suffering and loss of amenity", citing *Dobson v Thames Water Utilities and others* [2009] EWCA Civ 28 at [31] - [36]. The correct

principle is to identify the reduction in the amenity value of the land caused by the proven nuisance. This has the following consequences:

(1) Only one global award is to be made for general damage in respect of a single property, however many the Plaintiffs may be suing.

(2) The amount must be related to, and reflect, the diminished value of the enjoyment of the property.

(3) That degree of diminution is to be assessed on an objective basis; in other words it depends on the notional value to a hypothetical average occupier, and is not to be affected by any subjective characteristics of susceptibilities of the actual Plaintiff or Plaintiffs.

(4) The personal discomfort of the actual Plaintiffs becomes relevant only as evidence in the process of assessing the financial diminution in value of the land. This would be the case where, for example, there is no evidence of comparable market letting values for property with and without the nuisance or a similar nuisance. In such a case, the experience of the actual Plaintiffs might provide the best evidence available from which the financial assessment of diminution of amenity value might be calculated: see ***Dobson*** at [33].

(5) In the case of building works, such loss in amenity value is to be assessed only with regard to the effect of the *undue* or *excessive* nuisance beyond the inevitable irritation of such works if reasonably performed, which the court must, by definition, have found to have occurred for there to be liability in nuisance at all. Care must be taken to compensate only for that additional element (see ***Andreae v Selfridge & Co*** above).

126. In applying these principles, Advocate Hill submitted that a different measure of damage must apply to the period whilst the Birnies continued to occupy the property, (ie between the beginning of March 2012 at the earliest and the end of August 2012 when they moved out) and the subsequent period when they were not in occupation, i.e. from and including September 2012 until the end of the nuisance, or the actual or reasonable (if earlier) date of the Birnies' return to the house.

127. As to the first period, he submitted that there was no evidence on which to found an award of substantial damages, in the light of the Birnies' evidence in the Lloyd litigation, (already referred to), from which it was to be inferred that no *undue or excessive* degree of nuisance was being suffered, at any rate before August. In the circumstances, he submitted that only an award of nominal damages ought to be made. (This submission has been overtaken by the Jurats' findings of fact above).

128. As to the second period, Advocate Hill referred once again to ***Dobson*** (above) at [34]:

> "*If the house is unoccupied through the time of the (transitory) nuisance, has suffered no physical injury, loss of value or other pecuniary damage, and would not in any event have been rented out, we are unable to see how there can be any damages beyond perhaps the nominal. A homeowner may be posted abroad or working elsewhere without knowing when he will return, but may wish to keep the house available for himself at any time. He may be living elsewhere and waiting for the market to rise before selling. The house may be empty awaiting renovation. In none of those situations would there be any actual loss of amenity……".*

129. He submitted, therefore, that as no actual loss of amenity value had been suffered by the Plaintiffs during this period. He did not, however, go so far as to submit that only nominal damages should therefore be awarded in respect of this period as a result, nor, as the Lt-Bailiff understood him, to submit that the court should find that the house being empty was a fact entirely divorced from the incidence of nuisance. He simply submitted that the award of damages must be limited to

the costs of the alternative accommodation which the Birnies had rented (which the States were prepared to treat as reasonable), and as had in fact been offered by the States.

130. The Lt-Bailiff accepts Advocate Hill's five propositions in principle, and will direct the Jurats accordingly. She also accepts that they can and should be applied directly with regard to any assessment of general damages attributable to the period whilst the Birnies were in occupation of Vue de l'Eglise.

131. However that principle (ie that damages should reflect the loss of amenity of the property by calculating a notional reduction in its letting value) is difficult to apply directly to the period when the Birnies were not in occupation, in the circumstances of this case. The cited paragraph from *Dobson* shows that in English law the award of damages for loss of amenity value of the land is made on the basis that, on the facts, this is the damage the Plaintiff has actually suffered, and it is not awarded where he has not suffered it. However, the examples given are all cases where the Plaintiff is not occupying the property through choice. The case where the Plaintiff has reasonably been driven from the property by the nuisance itself is not referred to and is not such a case. In this context, moreover, the appropriate level of general damages must be affected by any award by way of special damage, if made, for the costs of alternative accommodation, since these are themselves the loss, in terms of expenditure, caused to the Plaintiffs by the nuisance. The issue then becomes the appropriate measure of general damages, if any, which ought to be awarded in addition to an effective indemnity for the Plaintiffs' reasonable costs incurred in moving into temporary alternative accommodation.

132. The Lt-Bailiff therefore holds that in this situation, paying due regard to the underlying principle that the measure of general damages is the diminished value of the enjoyment of the Plaintiffs' property caused by the nuisance, the appropriate measure of any general damages is such sum as would fairly compensate for any *additional* loss sustained by the Plaintiffs, attributable to any lower level in the amenity or facilities of their temporary accommodation, as compared with the amenity and facilities of their own property if the relevant nuisance (ie the excessive nuisance) had not occurred, and of which they have been deprived as a result of reasonably having to vacate that property.

Directions to the Jurats

133. The Lt-Bailiff directed the Jurats that the assessment of the correct and appropriate measure of damages was a matter entirely for them, to form their own judgment as a matter of fact, based on the principles stated above at Paragraphs 125 and 132 and the following further guidance.

134. With regard to the specific items of loss and damage claimed in the Plaintiff's Schedule, they should decide if they were satisfied that such items of specific loss had been caused to the Plaintiffs by the undue nuisance which they (the Jurats) had found, and if so, what sum they found proved as the amount of such loss.

135. With regard to the further claim for non-specific, general damages, they should consider what sum, if any, they then thought it right to award as representing any loss of amenity value during the time when the Birnies were living at Vue de l'Eglise and any comparative loss of amenity during the time when the Birnies were living in the Vazon Bay accommodation.

Damages

136. The Jurats therefore went on to consider the several heads of claim made by Mr and Mrs Birnie and listed at Paragraph 49 above, and made the following findings:

(c) Rent - £54,700

137. This related to the claimed cost of renting the Vazon Bay holiday apartment and latterly a cottage in the same complex, between 27th August 2012 and 31st January 2014.

138. Advocate Hill did not seek to argue that the rates apparently charged to the Birnies were unreasonable rates for the accommodation itself, nor that it was unreasonable for them to take that accommodation.

139. Advocate Hill did object that any conceivable nuisance to the Birnies had ceased by 9th November 2013 at the latest, such that no award of damages could be made in respect of any period later than this date. The Jurats did not quite accept that. Given that the Birnies had reasonably rented alternative accommodation, the issue was whether they could and should have arranged to terminate that rental earlier than they in fact did. The Jurats have found, as previously mentioned, that the Birnies could, and should, have done this by the end of November 2013, and returned to Vue de l'Eglise,

140. In support of this head of claim for rent, Mr Birnie produced certain "invoices" from the landlord. However, it was not possible to reconcile the sums there stated with the rental sum claimed by him in the Schedule, because the documents were not a sequence of invoices, but more in the nature of statements - some, indeed being dated February 2014, - and the periods to which they related both overlapped in places and were incomplete in others.

141. From these invoices it appears that the rental rates being charged for the accommodation at Vazon Bay were £4,800 pcm during the summer months, which the Jurats find to be May to September inclusive, and £2,750 pcm for the winter months and, as mentioned, these rates have not been challenged by the States as unreasonable in themselves. The Jurats have found it to have been reasonable for the Birnies to occupy this accommodation from September 2012 to November 2013, inclusive. They therefore calculate the rent accrued in respect of this period to be 6 months at the summer rate (£28,800) and 9 months at the winter rate (£24,750). This is a total of £53,550. The Jurats therefore award **£53,550** under this head of special damage.

(d) "Removal costs" - £9,500

142. As evidence in support of this claim Mr Birnie produced a statement from Fast Move Services totalling this sum. However, £7,200 of this was the monthly costs of furniture storage, and the remainder (£2,300) was described as the costs of removing and delivering furniture *into store*, and back to the house. The Vazon Bay accommodation was furnished accommodation. The Jurats find, therefore, that this expenditure was incurred on furniture storage costs, and was not the costs of removing the Birnies to their temporary accommodation at Vazon Bay.

143. The Jurats reject any claim in respect of such costs, for two reasons. First, they find as a fact that the Birnies actually removed their furniture to store, on 18th August 2012, not because of a perceived need to protect it from the claimed nuisance (here being dust), but because they had agreed to let the property, vacant, to Mr and Mrs Lloyd. Second, the Jurats find in any event that it was neither necessary nor reasonable to remove the furniture in the house into store in response to the effects of the alleged nuisance. Effective steps to protect the furniture from dust insofar as necessary could have been taken by storing and sealing up furniture in rooms within the property (as builders are accustomed to do when carrying out dusty alteration works), or in outbuildings, and/or by wrapping in appropriate dust cover protection. Such measures could have been taken at a fraction of the costs of removing the furniture to storage

144. The Jurats will not, therefore, allow this sum. However, they bear in mind the direction of the Lt-Bailiff that a proper measure of damage has regard to any reduced value of the amenity of the property suffering the nuisance. They consider that a sum representing the costs of reasonable and necessary furniture protection during the relevant period would, in the circumstances, properly reflect such reduced value.

145. There has been no evidence of such actual costs. The Jurats have therefore considered whether they should confine this award to a mere nominal sum. They are, however, satisfied from experience and common sense that on balance of probability expenditure of at least £1,500 would reasonably have been incurred on such measures. Since they are satisfied that the Birnies did in

fact incur expenditure in this regard in excess of that sum, an award of such sum will not, therefore, be over-compensation. They therefore award **£1,500** under this head

(e) Replacement pool pump - £500

(f) New sand in pool filter - £80

146. Whilst there was little evidence beyond Mr Birnie's assertion in respect of these items, the Jurats note from the evidence of the Complaints Register that similar complaints were received from others (for example a Mr Wilson) and new pumps were paid for. They therefore find, on balance of probability, that these complaints were reasonable and they will award the sums claimed. They thereof award **£580** in respect of these two items.

(g) Cleaning of cars - £500

147. There is no documentation supporting this claim. Mr Birnie relied on the photographs of dust laden cars, and his evidence that he was obliged to get the elderly local man who usually washed his car to do so more frequently, during the first few months of the works in the Southern Compound. The claimed figure was his estimate of the extra money which he had paid over for this, in cash, before ceasing to have the cars washed because of the increased danger of their being scratched by so doing.

148. The Jurats do not accept this figure. They have no faith in Mr Birnie's unsupported estimate and in any event regard the amount as excessive, as the Birnies could have used a car wash, at a far lower cost. They note from the Complaints Register that costs of additional car washing in a car wash were on occasions accepted and paid for by the States for others. The Jurats consider that it would be reasonable for the Birnies to have spent an extra £25 per month in car washing during four months (May – August 2012) when they remained at Vue de l'Eglise, using a car wash, and they are prepared to assume that they did incur that much extra expenditure. They therefore award **£100** under this head.

(h) Replacement cost of dead Koi carp (10) - £3,000

149. This claim rests on Mr Birnie's evidence, which the Jurats do accept, that 11 koi carp died in the koi carp pond at the house during the period of the airport works, whilst in the normal course only one or two would have died of natural causes during such period. He submits that therefore, on balance of probability, this increase in death toll must have been caused by the effects of intrusive noxious dust or suchlike from the Southern Compound. As to the figure claimed, Mr Birnie produced a recent quotation from a koi carp supplier.

150. Mr Birnie's case rests entirely on the inference above, which he asks the court to make. There has been no veterinary evidence as to the cause of death of the fish and no post mortem. This is despite the fact that Deputy Luxon enquired about whether this step had been taken as early as at the meeting of 26th June 2012. Mr Birnie's reason for not having had the remains of a dead fish analysed was that this was unthinkable, because they were pets.

151. The Jurats regard this reason for failing to take an obvious step in support of this claim as bizarre and unacceptable. In the absence of supporting evidence they are not satisfied that the cause of the death of these fish was any activity amounting to an actionable nuisance in the Southern Compound at all, there being the obvious possibility of a disease from some other source. They therefore reject this head of claim.

152. (In the light of the Jurats' findings of fact in this regard, the Lt-Bailiff records that it was unnecessary to consider, or to make any holding of law - or to elicit any other findings of fact from the Jurats for the purposes of doing so - as to two matters, namely (i) whether damages in nuisance are recoverable purely for damage to personal property as contrasted with damage to the land itself and the effects thereof, and (ii) if they are, whether the particular susceptibility of the plaintiff to the nuisance in question would give rise to a defence in Guernsey law)

(i) Transfer of telephone lines - £102

(j) Redirection of mail - £176

(k) Extra insurance costs - £216

153. The Jurats consider (and so find) that these are normal and predictable costs associated with having to move out of one's home to temporary accommodation for more than a minimal period of time. They consider it fair that the Birnies should be reimbursed for these; they should be regarded as increasing their loss of the amenity of Vue de l'Eglise.

154. Receipts were produced in respect of the first two items. No receipt was produced in respect of the third because Mr Birnie said that this increase was simply subsumed into the premium. His evidence was that this was his recollection of the increase. Whilst the Jurats have some hesitation about accepting the accuracy of Mr Birnie's recollection, the figure claimed is consistent with what they would expect and they will therefore allow it. The upshot is that they accept all three items in the sums claimed and award **£494** in aggregate.

(l) Extra mileage and fuel - £1,000

155. This claim is for additional such costs claimed to arise through living at Vazon Bay for 17 months between and including September 2012 and January 2014, rather than at Vue de l'Eglise. Mr Birnie said that this related principally to three distinct matters which were,

i. additional fuel costs incurred by having to make journeys back and forth between Vazon and Forest to inspect and look after Vue de l'Eglise whilst living at Vazon,

ii. additional costs of having to drive Richard from Vazon to various meetings and activities, such as scouts, etc, which took place near Vue de l'Eglise and

iii. additional mileage from Vazon for Mrs Birnie to go to work and for Richard to go to school at Elizabeth College, as compared to Vue de l'Eglise.

156. No documentation or other evidence has been produced in support of this claim or its calculation. It is again made simply on the basis of Mr Birnie's own estimate.

157. The Jurats find this claim to be greatly exaggerated. First they do not accept that there is any significant extra mileage under head (iii). Second, they are not satisfied that any significant extra mileage was incurred with regard to head (ii), in the light of Richard Birnie's evidence that he cycled to such events, cycling rather further whilst staying at Vazon. This leaves only head (i) and whilst the Jurats are prepared to accept that some additional journeys would have been reasonably made in inspecting Vue de l'Eglise and feeding the fish, they are sceptical that these would have been separate individual journeys rather than incorporated into journeys for other purposes.

158. Doing the best they can, the Jurats consider that they can be satisfied, on the balance of probabilities, that the Birnies will have driven about 20 miles extra per week whilst living at Vazon, principally attributable to inspection journeys. They are satisfied that the total additional fuel costs which this would have incurred would be fairly represented by an award of **£200,** which they therefore make.

(m) Cleaning of house exterior - TBA

(n) Cleaning of carpets - TBA

(o) Cleaning of curtains - TBA

159. There is no direct evidence in support of these items of claim. Mr Birnie merely asserts that these things obviously needed to be done coupled with reliance on the fact that the States offered to

clean the house before the Birnies moved back in conjunction with the offer of rental costs made through Mr Prickett in August 2012, and again, albeit as part of a "full and final settlement" offer by Deputy Luxon in September 2012.

160. However, this work has never actually been done since the Birnies moved back in January 2014. No satisfactory reason has been given as to why not. It is not even the case that any quotations have been obtained. Their absence severely undermines any suggestion that this was because the Birnies could not afford to have any such work done (although this was hinted at by Mr Birnie).

161. In these circumstances, and particularly the fact that the works have not been done nor any steps taken towards doing so in 16 months, which is inconsistent with their being really and seriously required, the Jurats reject this head of claim.

162. (For the sake of completeness, the Lt-Bailiff records that after the conclusion of the hearing and whilst this judgment was in preparation, Mr Birnie sent to the court and to the Defendants an estimate of costs of cleaning the entire house, carpets, curtains etc which he had obtained after the trial had been concluded, requesting this to be taken into account and stating that this was justified because these items had been marked "TBA". The Lt-Bailiff has ruled that the trial should not be reopened to receive such evidence, as this evidence could with reasonable diligence, and should, have been produced at or before the trial itself, if it was to be relied on. It does not, in any event, affect the basis of the Jurats' conclusion in Paragraph 161.)

(p) Cleaning and transport of drum kit - £4,000

163. This claim relates to the costs of cleaning a drum kit which was housed in a ground floor room at the house. It was purchased approximately 10 years ago, when Richard Birnie was aged around 8 or 9. It was played by Richard, at least initially, and also by Mr Birnie himself. It was a large drum kit, as shown from a photograph which was produced, Mr Birnie gave evidence that it had cost about £30,000. In order to demonstrate the state to which it had been reduced as a result (Mr Birnie said) of the excessive dust penetrating the house from the Southern Compound, Mr Birnie brought a drum and a cymbal to court as exhibits, and they were duly examined by the Court.

164. The quantum evidence for this head of claim came entirely from Mr Birnie, who on at least two occasions at the hearing (although not within his witness statement) explained that cleaning the kit was a specialist job, and how he had located an elderly craftsman at Aldershot in the UK, who could properly clean and restore such kits (having previously done so for the army) and who had given him, as an informal oral quotation, the information as to cost which he was giving to the Court. The costs of transporting the kit would be £1,500-£2,000 and the costs of the actual work would be £2,000 or more depending on what was found to be required upon examination. The quotation had been given by the craftsman on the basis of information given to him by Mr Birnie.

165. The Jurats examined the drum and cymbal and the comparison which Mr Birnie invited between the state of the generally exposed surface of the cymbal and that where it had been protected by its felt fixing. They noted dust on the cymbal, and also on the drum, when removed from its case. They also noted significant scratch damage to the rim and side of the drum caused (Mr Birnie said) by Richard packing away the kit carelessly when younger. They noted the evidence that as a general rule the drum kit had been left out rather than packed away, and had simply been covered over with a sheet, although at times, Mr Birnie said, it might have been left exposed - but only for a day or so - when Richard had left the kit without covering it.

166. The Jurats were not satisfied that the drum kit had been as carefully looked after, as Mr Birnie suggested, or indeed at all. They formed the impression that the differences in the state of the surface of the cymbal were consistent more with it having been generally left exposed to the atmosphere over time, rather than with any sudden additional deterioration in its environment resulting from the effects of works in the Southern Compound. They noted that it was not suggested that any further steps to protect the valuable drum-kit had been taken, even when the

Birnies had become aware of the prospect of dust from the works, and when careful owners might have been expected to do so.

167. The Jurats also felt unable to place any reliance on the informal quotation of which Mr Birnie gave evidence, first because it was hearsay and had been obtained only on the basis of information conveyed by Mr Birnie himself, and second because they could have no confidence that it comprised only work required to remedy the results of any actionable nuisance from works in the Southern Compound (ie unduly excessive quantities of dust, etc) rather than deterioration from general exposure, wear and tear, or some other cause.

168. In the circumstances, therefore, they reject this item and make no award.

(q) Loss of enjoyment of property – plaintiffs and son - £450,000

Preliminary points of law.

169. This item is the general damages claim as to which the Lt-Bailiff directed the Jurats as mentioned in Paragraphs 132 and 135 above. It is, of course, by far the most significant element of the Plaintiffs' claim. It had risen from £50,000 in the original cause and at the time of the mediation, to £450,000 in the Plaintiffs' updated schedule of loss for the purpose of the trial. The basis of this figure was entirely unexplained until Mr Birnie was questioned by the Court at the trial.

170. He explained that the calculation was based on a figure of £1,000 per week for each of himself, his wife and Richard, for a total of 150 weeks. When asked how he justified this, he said that it was compensation for the disruption and inconvenience each of them had suffered as a result of the nuisance caused by the works being located and carried on in the Southern Compound, and this disruption and stress had now been going on for over three years, and was even continuing.

171. Advocate Hill's first objection was that unless and until Richard was a party to the action, no damages referable to a personal claim by him could be granted on any basis. This point was made early in the trial and the Lt-Bailiff upholds it. When met with this objection, Mr Birnie said that in that case his claim represented 150 weeks at £1,500 each for himself and his wife.

172. Advocate Hill's second objection was that the period in respect of which these sums were calculated was in any event plainly unjustifiable. The Lt-Bailiff upholds this objection as well. The Jurats have found that the nuisance to the Birnies as to which there is no defence of 'reasonable steps' took place between and only between May 2012 and August 2012 when the Birnies were in occupation of the property and then, with the same circumstances operating, through to November 2013, during their reasonable absence. These periods total only 19 months, and it is only in respect of this total period that damages can properly be awarded, not 150 weeks. The 'ongoing' effects of which Mr Birnie has vociferously complained beyond this time have not been caused by the nuisance, but by this litigation.

173. The Lt-Bailiff therefore directed the Jurats that they should consider whether or not it was appropriate to make any further award by way of general damages as she had directed in Paragraph 135 above, and that this could be only in respect of the periods during which the Plaintiffs could be held to have suffered a loss because of the effects of the nuisance in impairing the amenity value of their accommodation. This was of Vue de l'Eglise whilst they lived in it, and of the accommodation which they rented, by comparison with that of Vue de l'Eglise, whilst they did not.

Findings of the Jurats

174. The Jurats have the evidence of what the Lloyds were prepared to pay to rent Vue de l'Eglise with knowledge of the existence of the works but in the apparent belief that these did not cause nuisance beyond reasonably tolerable levels, namely £2,900 pcm. This is effectively the standard of amenity of Vue de l'Eglise with no actionable (ie undue) nuisance attached. They have no evidence of the letting value of Vue de l'Eglise with full appreciation of the actual nuisance, but

the fact that they find that this would reasonably be regarded as intolerable by the ordinary occupier suggests that a very large discount from this figure is appropriate. As another way of assessing an appropriate discount, they have asked themselves what would be a reasonable figure in compensation for the "intolerable" element of nuisance which was essentially disturbance to sleep. They have concluded that an appropriate figure in this regard would be £1,500 per month. They apply this to the four months, May to August 2012 during which they find this severe degree of excessive nuisance to have affected the Birnies. This totals £6,000.

175. They then turn to consider whether any such further award is appropriate in regard to the period when the Birnies were not affected by this intolerable degree of nuisance because they were living elsewhere. They note that the Vazon Bay apartments and latterly the cottage were significantly smaller than Vue de l'Eglise, and had less amenity attached. On balance they consider that some further award for loss of amenity is appropriate, based on a comparison between the degree of amenity of Vazon Bay as compared with Vue de l'Eglise if it had sustained only the level of "mere" nuisance. They consider this to be fairly represented by the sum of £300 pcm, and they will award this for the 15 months from September 2012 to November 2013. This totals £4,500.

176. The result, therefore, is that the Jurats will make an award to the Plaintiffs by way of general damages of **£10,500**.

Conclusion

177. The effect of the above findings is that the Jurats find for the Plaintiffs in damages, in the total sum of **£66,924.**

Claim under Human Rights Law

178. For completeness, the Court must deal with the further claim made by the Defendants under Articles 8 and Article 1 of the First Protocol of the European Convention on Human Rights and Fundamental Freedoms made possible by way of the Human Rights (Bailiwick of Guernsey) Law 2000.

179. This claim has not been seriously pursued or argued by the Birnies, who have naturally focused on the facts of the case, but it remains within the Cause and the court must therefore make a ruling on it. In practice this can be dealt with quite shortly.

180. Article 8, so far as conceivably relevant, enshrines an individual's right to "*respect for his private and family life [and] his home….".* In practice it is only the 'home' which could be material in this case, since no interference with the Plaintiffs' private life or family life as such is alleged. Furthermore, the right is only to 'respect' for one's home, and it is also a qualified right (see Article 8.2), and can be derogated from insofar as is "*necessary in a democratic society*" in specified national and communal interests of "*for the protection of the rights and freedoms of others*". Similarly, under Article 1 of the First Protocol, an individual is accorded a qualified right to the '*peaceful enjoyment of his possessions*'.

181. A public authority (such as the States) is obliged under s. 6 of the Human Rights Law not to act in a manner incompatible with an individual's convention rights. If it does, the court may make an award of damages against it (s .8) but only insofar as necessary to afford the Plaintiff "just satisfaction" in regard to his complaint, see s. 8(3) of the Law. In considering whether it must do so, the court will take into account any other relief granted to the Plaintiffs, such as an award of damages in private law in respect of the matters complained of, and it must also have regard to the levels of compensation awarded by the European Court of Human Rights under Article 41 of the Convention (see s. 8(4) which, Advocate Hill submits (and the court accepts) appear modest to British eyes.

182. Applying such principles in the identically worded UK Human Rights Act 1998, *Dobson v Thames Water Utilities and others* [2009] EWCA Civ 28, decided that if an award of damages has been made under national private law - in that case also an award for damages for nuisance - it will only be where there are particular further factors material to the complainant's grievance under the Human Rights legislation which have not been taken into account in that award of damages, (eg because they are peculiarly personal) that a claimant will have any prospect of improving on his damages award by resorting to his rights under Human Rights Act.

183. The Lt-Bailiff holds that similar principles clearly apply in Guernsey, under the Human Rights Law 2000. No such further features or considerations appear to the Court to arise, or to be suggested in this case, as affecting either Plaintiff. This head of the Plaintiffs' claim is therefore dismissed.

Result

184. The result, therefore is that the court finds for the Plaintiffs and will award them the sum of £66,924 by way of damages in respect of their claim in nuisance. The claim to relief under the Human Rights Law is dismissed. The issue of costs will be adjourned to a later hearing at a convenient date before the Lt-Bailiff alone.

Rider

185. Lastly, the Jurats wish to add a final rider to their findings in the case.

186. They are unanimously of the opinion that this case ought never to have come to court, and that if the parties had sat down together and held sensible discussions, an accommodation could have been reached between them without that need. The Jurats were struck by the fact that this appeared to have happened as regards all other complaints of alleged nuisance from the works at the airport - and the Birnies were far from being the only complainant. In some cases additional works were carried out to properties at the States' expense to alleviate the situation. Each case was, it appears to the Jurats, reasonably handled, in an appropriate way, on its merits.

187. The Jurats are of the unanimous view that the fact that this did not happen in this case was due entirely to the attitude of Mr Birnie, who took an unreasonably aggressive, confrontational and intransigent approach, quite unnecessarily, right from the outset, and to his utterly unrealistic assessment of the value of his perceived complaints, in money terms. The Jurats do not propose to speculate on the reasons for this, and they have treated it as having no bearing on the proper level of compensation which ought to be made to the Birnies for such actionable nuisance as they have in fact suffered. It has, however, in the Jurats' view, caused vastly increased costs in resolving a dispute which could and should have been the resolved by negotiation between the parties.

10th June 2015