

IN THE SENIOR COURTS OF BELIZE A.D. 2025

CLAIM NO. CF 360 OF 2022

BETWEEN:

NICOLE MIDDLETON

CLAIMANT

AND

[1] HONGBIN HE
Doing Business As JM 1 RESTAURANT

[2] DAVID MONTERO

DEFENDANTS

Appearances:

Ms. Stevanni Ferrera for the claimant

Mr. Estavan Perera for the 1st defendant

Mr. O.J. Elrington for 2nd defendant

2024: December 4, 5 & 9;

2025: March 26;

April 10;

June 27.

JUDGMENT

Private nuisance – Burden of proof - Damages

[1] **GOONETILLEKE, J.:** The claimant who resides at Cemetery Road, Belize City claims that the 1st defendant who operates a restaurant in the adjoining premises is causing a nuisance by emitting cooking grease from his kitchen which comes over to her property, thereby causing damage to her property and equipment, injuring her health and preventing her from the usual utilization of her home. The 2nd defendant is the landlord of the 1st defendant and resides above the restaurant.

[2] Prior to the commencement of the trial, the claimant discontinued the claim against the 2nd defendant. Therefore, the 1st defendant will henceforth be referred to as the 'defendant'.

[3] The defendant denies the claim and states that he is in compliance with the regulations and operates a legal business. He states that he has installed a thirty (30) foot high chimney away from the claimant's house and that none of the other neighbours have complained of grease on their properties. He denies that any grease is emitted from his restaurant and points out that the claimant resides in a busy commercial area next to a busy road with shops, commercial establishments, a bus station and other eateries, that may be the cause of the claimant's complaint.

[4] The court made a visit to the locality of the claimant's property, including the defendant's restaurant and the surrounding neighbourhood to gain a firsthand perspective of the locus. All counsel and parties were present during this visit, on the 5th December 2024.

THE CLAIM OF THE CLAIMANT

[5] The claimant, claims for; (a) general damages for nuisance (b) general damages for personal injuries suffered by the claimant (c) special damages in a sum of Belize Dollars (BZD) Three Thousand Twenty-Five and Ninety-Five Cents (BZD 3,025.95) (d) a permanent injunction to restrain the defendant from causing a nuisance on the land located at 56 Cemetery Road, Belize City.

[6] In her witness statement the claimant particularised the special damages as follows:

Flat screen 32" television	- \$ 0475.00
18" Industrial fan	- \$ 0022.95
1 small sofa set	- \$ 0750.00
1 stereo	- \$ 0500.00
Doctor visits	- \$ 0205.00
Lasko fan	- \$ 0099.00
Mabe Refrigerator	- \$ 0974.00

House

- \$ 34,000.00

[7] The defendant raised an objection to the \$ 34,000 claimed for the house on the basis that it had not been pleaded as special damages in the statement of claim.

[8] Rule 8.9(5) of the Supreme Court (Civil Procedure) Rules 2005 which were the applicable Rules at the time the claim was filed, states that “*the claimant must include in, or attach to, the claim form or statement of claim a schedule of special damages*”. This is repeated in the Senior Courts (Civil Procedure) Rules 2025 at Rule 8.10 (6). Those Rules, however, apply to personal injuries. Nevertheless, the general rule is that special damages must be pleaded.

[9] Referring to the distinction between general and special damages, **McGregor on Damages**¹ states that all damages in tort would concern general damages. This statement is exemplified by reference to the dicta of Lord Macnaughton in **Stoms Bruks Aktie Bolag v Hutchison**², wherein he stated that;

“ ‘General damages’... are such as the law will presume to be the direct natural or probable consequences of the action complained of. ‘Special damages’, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, must be claimed specially and proved strictly”.³

I therefore reject any claim for special damages for the house, as stated in the claimant’s witness statement, as it has not been specifically pleaded in the claim or statement of claim.

[10] In her statement of claim, the claimant also gives the following particulars of personal injury;

- (i) Gastroesophageal Reflux Disease; (ii) Lactose intolerance; (iii) Nausea, (iv) Vomiting, (v) Vertigo and (vi) Dyspnoea.

¹ 22nd ed. (2024)

² [1905] AC 515

³ Ibid pp 525- 526

EVIDENCE OF THE PARTIES

- [11] The claimant herself and one her relatives, Glenford Middleton Jnr, gave evidence as to locality of the premises, the proximity of the defendant's restaurant and the grease on and in the claimant's house. The claimant produced photographs to show the grease on her furniture, household equipment, windows, outside walls of her house and the yard.
- [12] The claimant's description of the events is that the defendant's restaurant cooks a lot of fried food. She states that the fan from the restaurant blows "*all the grease and black smoke from inside of the kitchen of the restaurant out of the restaurant. This vent's external component is an L- shaped structure on the restaurant's exterior wall facing my property. The opening for the vent is pointing straight at my house*".⁴ She then goes on to state that she had informed the person operating the restaurant that "*grease and black smoke blows out of the vent directly at my house*".⁵
- [13] The claimant states that the restaurant has been operating ever since she moved into the land. She describes her living conditions as follows;

"My furniture and appliances were constantly covered in grease and filth. I have to live with my furniture and appliances covered with cloths and plastics, as much as possible, so that they do not get covered by grease and gunk. I have to keep my windows and doors closed. I cannot hang my laundry outside without them getting dirty and greasy".⁶

She goes to state;

"So my personal belongings, including furniture and appliances have grease settling on them...initially I used to clean and wipe down my house every day. But I have been forced to deal with this situation for so long that I am tired. I am just tired of living in grease and filth. I am tired of having to constantly be cleaning. I am tired of trying to get help from the authorities without them actually rendering assistance. I am just tired of it all and want some real help to address this problem. This is why I have now come to the court".⁷

⁴ Paragraph 6 of the witness statement of Nicole Middleton.

⁵ Paragraph 7 of the witness statement of Nicole Middleton.

⁶ Paragraph 12 of the witness statement of Nicole Middleton.

⁷ Paragraphs 13 and 15 of the witness statement of Nicole Middleton.

- [14] On behalf of the defendant, the defendant himself gave evidence to demonstrate that the chimney of his kitchen was located away from the claimant's house; was 30 feet high, and that no one else had complained about the issue. Stephanie Castillo, a Public Health Inspector of the Environment Health Department who had inspected the defendant's restaurant gave evidence to state that she has regularly inspected the restaurant and that the reports she gave were that the restaurant exceeded health requirements. She described the kitchen as a windowless kitchen in which the smoke is trapped by a hood and that the oil is trapped by a filter. She stated that an extractor fan then takes out the hot air and that it exits from the chimney. In evidence it was brought out that the chimney ought to be taller than the surrounding structures, so that any oil particles do not go up but fall due to gravity. What blows out of the chimney is expected to be just hot air. In this case, the chimney is 30 feet high and taller than any of the other surrounding structures.
- [15] Two medical experts gave evidence as to the health condition of Ms. Middleton. Dr. Alain Gonzalez who had examined the claimant gave a report and testified *viva voce* stating that the claimant has a medical condition called Gastroesophageal Reflux Disease (**GERD**). It was his opinion that smoke and fumes from a restaurant could cause or exacerbate the condition. He stated, however, that further tests were required to make a better a diagnosis. He also conceded in cross examination that the claimant's habit of smoking marijuana could exacerbate her symptoms.
- [16] Dr. Edgar Lope also examined the claimant. He stated that in his opinion, smoking and exposure to second hand smoke did play a role in GERD but that proper investigation and testing was important to rule out other causes. Dr. Lopez in his report also states that the claimant has been a chronic marijuana smoker for more than ten (10) years and that this can cause Cannabinoid Hyperemesis Syndrome (CHS). He states that CHS is also characterised by repeated and sever bouts of vomiting, nausea, abdominal pain, weight loss and dehydration. It was his view that in the absence of detailed investigation and tests it would not be possible to attribute the claimant's health condition to smoke and fumes.

ISSUES TO BE DETERMINED

[17] The following issues arise to be determined from the pleadings:

1. As a matter of fact, does grease from the claimant's restaurant escape and settle on and, in the claimant's, house?
2. If so; has the defendant caused a nuisance thereby?
3. Has the claimant's health been affected by the smoke and grease from the defendant's restaurant?
4. Is the claimant entitled to an injunction against the defendant?
5. Is the defendant liable to damages and if so, what is the extent of damages payable by the defendant?

DISCUSSION AND ANALYSIS

First Issue - As a matter of fact, does grease from the claimant's restaurant escape and settle on and, in the claimant's house?

[18] The burden of proving any particular fact is on the person who alleges it.⁸ Therefore, the burden of proving that grease from the defendant's kitchen falls on and in the claimant's house, is on the claimant. The standard of proof is the civil standard, which means that such fact has to be proved on a balance of probabilities.

The substances in the claimant's house and property

[19] There is no expert evidence to establish that the material on the claimant's furniture and equipment in her house is cooking grease. The claimant says so, but that is her view. Ideally, the substances on the claimant's equipment should have been analysed in a lab and shown to be cooking grease/fat and that it is similar to that used by the defendant. No such evidence is available to the court.

⁸ *Nicholson v Nicholson* [2024] CCJ 1 (AJ), *Ramdeo v Herall* [2009] CCJ 3 (AJ), *Construction Line v Imperial Smelting Corporation* [1947] AC 154, *In Re B (Children)* [2008] UKHL 35.

[20] It was suggested to the claimant in cross examination that she cooked in her house and did baking which the claimant accepted. However, she stated that she had stopped baking and selling food for some time. It was also suggested to the claimant in cross examination that she lived on a busy street where fumes and dust from the road and vehicles came into her house. This is quite probable. Further, it was suggested that there was another cooking establishment across the street from her. The response was that this other food outlet did not cook extensively and for long hours.

[21] What appears from the photographs produced by the claimant marked NM 1 at pages 554 -566 of the record, is that the furniture and the fans and windows of the claimant have a blackish grimy substance. This could be dust and exhaust particles spreading from the busy road which is a few feet away from the claimant's house that may or may not be mixed with any oily substance. This court, however, cannot venture to speculate. The claimant cannot rely on speculation to prove her case.

The location of the claimant's house

[22] The claimant's house is close to an intersection on Cemetery Road, which is a busy road. The claimant has in her front yard a vendor in a tent that sells plastic wares. This vendor is one of her tenants. The claimant also has in a corner of her front yard right next to the defendant's restaurant, a little shed which she rents out to another vendor who sells clothes. These clothes are hung in the open. Both these tenants of the claimant did not come forward to give evidence that they find grease on their wares. One of the claimant's complaints is that she cannot hang out her laundry as it collects dirt and grease. However, the claimant's tenant as can be seen in the picture HH 1 at page 484 of the record, hangs clothes out on display in the open, for sale. Of note is that these clothes are for sale and it is probable that the stock would not be sold or turned over in a day. Hence, if they are hung out, they would also be collecting the grease from the restaurant and a buyer would be reluctant to purchase clothes with grease on it. For the vendor, that would affect the sales price which ought to be a matter of complaint either as against the restaurant or against the landlord (the claimant) that the premises was unsuitable for that line of business. There is, however, no such complaint to be found disclosed either by the defendant or the claimant.

[23] The claimant's house is in a busy commercial area. There are also, a few other houses in close proximity to the restaurant. However, according to the health and regulatory authorities, it is only the claimant that has complained about smoke/grease from the defendant's restaurant.

The smoking gun – the smoking chimney

- [24] The claimant complains that there is black smoke and grease coming out of the defendant's chimney and that it is directed towards her house. The claimant's pictures of the chimney do not show any smoke coming out of it and the claimant has failed to demonstrate this. There is no picture of a smoking chimney let alone black smoke. The chimney is also not pointing towards the claimant's house; it goes straight up and at the top it is open in all directions so that exhaust can go in any direction, not particularly in the direction of the claimant's house. This leaves open the question, why other residents in proximity to the restaurant have not complained of grease. What is sauce for the goose is sauce for the gander; the grease and smoke cannot only be affecting the claimant if it is emanating in such a large quantity as suggested by the claimant.
- [25] The submissions for the claimant concede that there is no "*slam dunk*" or direct evidence to prove the case, but suggests that cumulatively, circumstantial evidence would point to the defendant's restaurant being responsible for the grease in the claimant's house.
- [26] I find however on the totality of the evidence before the court, that the claimant has failed to prove on a balance of probabilities that grease from the defendant's kitchen is what is on and in the claimant's house. To come to any other finding, the court would have to go out on a limb and speculate that it is the defendant's cooking grease that is on the claimant's house and equipment. That is not what is required in proving a case on a balance of probabilities. It is not for the court to venture and seek to explain what the substance on the claimant's equipment is, nor is the court required to find out and explain how that substance, whatever it be, came onto the claimant's equipment and house. Those are all matters for the claimant to prove. I find that the claimant has failed in this instance to prove its case on the facts.
- [27] The first issue is therefore answered in the negative.

Second Issue - If so; has the defendant caused a nuisance thereby?

- [28] As the first issue has been answered in the negative, there can be no nuisance attributed to the defendant. Given the circumstances of this case, however, if it was proved that the defendant's kitchen emanated smoke and grease, that *per se*, would not have proved a case of private nuisance.

[29] There is an interesting legal debate as to whether an activity such as that of the defendant's, would be a nuisance in a busy area of a city, where there is a mixed commercial and residential area. There is judicial thinking to suggest that the traditional view of private nuisance needs to be adjusted to reflect the reality of neighbours having to give and take when living in smaller areas of land, in a city. In the case of **St. Helen's Smelting** (11 HL Cas 642 at 640) Lord Westby stated that;

"[A]ny thing that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtably depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried out in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next to him, which is carrying on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop".

There is no firm finding on this point, as can be seen in the many divergent views expressed and discussed by the UK Supreme Court in **Coventry and Others v Lawrence and Another**.⁹

[30] I do not need to discuss this aspect of the matter any further, as the first issue has been answered in the negative and consequently there is no need to consider this issue.

Third Issue – Has the claimant's health been affected by the smoke and grease from the defendant's restaurant?

[31] Again, as the first issue has been answered in the negative, there is no need to answer this issue. In any event, the medical evidence is inconclusive that smoke and grease has caused the claimant's medical condition.

[32] There is, on the other hand, undenied evidence that the claimant has been a long-time smoker and that she has been smoking marijuana for more than ten years. Medical opinion states that this habit of the claimant may also cause the claimant's symptoms. Hence the third issue is answered in the negative.

⁹ [2014] UKSC 13.

Fourth Issue - Is the claimant entitled to an injunction against the defendant?

[33] This issue also need not be answered, as the first issue has been answered in the negative and that disposes of the claim.

[34] However, I add that like the second issue, there is a legal debate as to whether injunctive relief should be granted for private nuisance that occurs in a built-up area such as a town or city especially in view of the utility of the enjoined activity to third party users in a town and city. It is suggested that it would be more appropriate to award damages in such circumstances. In the case of **Coventry** (above); Lord Sumpton weighed in on this issue as follows;

“In my view, the decision in Shelfer is out of date, and it is unfortunate that it has been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control. The whole jurisprudence in this area will need one day to be reviewed by this court. There is much to be said for the view that damages are ordinary and adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties’ interests...”¹⁰

In that case, this view also found favour with Lord Clarke and with Lord Carnwath who stated that;

“ ... I agree with Lord Neuberger and the rest of the court that the opportunity should be taken to signal a move away from the strict criteria derived from Shelfer [1895] 1 Ch 287. This is particularly relevant to cases where an injunction would have serious consequences for third parties, such as employees of the defendant’s business...”

[35] In this case, however, there is no need to consider these matters any further.

¹⁰ [2014] UKSC 13 at para [161].

Fifth Issue - Is the defendant liable to damages and if so, what is the extend of damages payable by the defendant?

[36] As the first issues has been answered in the negative, this issue too does not arise to be answered, as the claim can be disposed of without answering this issue.

CONCLUSION

[37] The claimant has failed to prove her case on the facts.

[38] Costs follow the event, and the claimant will be liable to pay the costs of the defendant on the prescribed basis.

IT IS HEREBY ORDERED THAT

- (1) The claim is dismissed.
- (2) The claimant shall pay prescribed costs to the claimant.

Rajiv Goonetilleke
High Court Judge