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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**28/04/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

JOHN DRENNAN and SHARON DRENNAN

Plaintiffs

and

IAN WALSH

Defendant

_____

The Defendant appeared as a Litigant in Person
Mr Keith Gibson (instructed by Peter Dornan and Co, Solicitors) for the Plaintiffs

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McBRIDE J

Introduction

[1] The plaintiffs claim damages together with injunctive relief in respect of alleged trespass and nuisance by the defendant in and about his quarrying operations at Fishquarter Quarry, Kircubbin, County Down.

[2] The plaintiffs are married and are the joint owners of a residential property at 3 Coulter's Hill, Newtownards, which is their principal residence. The plaintiffs purchased the property as a building site in or around 2001. The present property, which is a substantial detached 2 storey, 6 bedroomed house with a two-storey garage, was built on the site and the plaintiffs have resided in this property from 2002 to date. In or around 2016 the defendant began to operate Fishquarter Quarry which had been disused for approximately 30 years. During the time it had been disused the quarry had been partially filled with water and aerial photographs show what appeared to be a lake at the site. The water has now been drained leaving a solid rock floor with near vertical walls approximately 14 meters high. The plaintiff's property is approximately 75 meters from the quarry face although the amenity space at the front of the dwelling is much closer. There is a roadway leading to the quarry which is routed immediately in front of the plaintiff's house

and quarry traffic use this roadway to access the quarry. Land surrounding the quarry is agricultural.

[3] The plaintiffs have previously challenged the operation of the quarry through representations to the local council and to the planning authorities and through legal proceedings. These endeavours have failed to lead to the quarry ceasing its activities as it emerged that planning permission had been granted on 19 May 1967 for "use of land for quarrying purposes at Fishquarter, Kircubbin" and this remained in place. No conditions or restrictions were attached to this planning permission.

[4] The defendant is the owner of the lands in which the quarry is situated. He is also the operator of the quarry.

[5] The plaintiffs complain about physical damage being caused to their property by reason of a quarry blast and, further, complain about ongoing noise and dust nuisance caused by the quarry operations. The plaintiffs now seek private law remedies in respect of the activities carried out by the defendant at the quarry insofar as those activities constitute a nuisance.

[6] The plaintiffs issued proceedings on 26 January 2018 and later sought an interlocutory injunction to restrain certain activities by the defendant in respect of his quarrying business. That application proceeded to trial, and I delivered a written judgment on 21 March 2018 [2018] NICh 3. Although I refused the application, I required certain undertakings to be given by the defendant and directed that those undertakings should remain in place until the trial date. The undertakings were in line with some of the recommendations made by Grainger Acoustics, sound and noise analysts, in their report dated 3 May 2018. The defendant agreed not to carry out any further blasting operations at the quarry save a blasting operation on 23 March 2018 which was to be carried out in accordance with a number of strict conditions. The defendant further gave an undertaking to operate the quarry only between the hours of 07:00hrs and 17:00hrs Monday to Friday and 0700hrs to 1400hrs on Saturdays save for returning lorries and the defendant agreed to use his best endeavours to ensure lorries returned before 1830hrs Monday to Friday and before 15:30hrs on Saturdays.

[7] After the interlocutory application the matter was pleaded out and the trial commenced on 13 January 2020. The plaintiffs were represented by Mr Keith Gibson of counsel. The defendant appeared as a litigant in person, although he had the assistance of a McKenzie Friend, Mr Connolly. After three days of evidence there was a suggestion that the parties would mediate. The matter was listed to resume on 27 January 2020. On 27 January 2020 Mr Walsh when asked if he wanted to give evidence refused to do so on the basis that his brother was seriously ill in hospital due to a rat bite, and as a result, he was in no fit state to give evidence. Thereafter, Mr Walsh indicated that he wished to instruct counsel to act on his behalf and the case was adjourned to facilitate this. Covid then intervened meaning that the matter did not reappear in the list until March 2021. When the case was relisted Mr Dunlop

KC appeared on behalf of Mr Walsh. To enable him to provide effective representation, CDs of the evidence already given were provided and transcripts were then produced by the parties. Mr Walsh gave evidence on 13 April 2021. The court asked for written submissions but before these were received the parties advised the court they were negotiating. In November 2021 Mr Dunlop then advised the court his solicitor intended to make an application to come off record. No such application was made, and the case was relisted for submissions. Given the delay between the hearing and submissions transcripts of the evidence were provided to the court together with written and oral submissions by counsel.

Applications before the court

[8] Mr Gibson made an application at the outset of the proceedings to amend the Statement of Claim to include amendments to reflect the fact that the defendant now owned the lands on which the quarry was situate and further to plead that the defendant had been convicted at Newtownards Magistrates' Court on 20 December 2019 of committing a statutory nuisance between 16 April 2019 and 20 December 2019. The defendant pleaded guilty to the offence and received a monetary penalty by way of a fine of £7,500 together with an order condemning him in the other party's costs of £5,000.

[9] Mr Walsh did not object to the proposed amendment and, accordingly, the court granted leave for the Statement of Claim to be amended as proposed.

The plaintiff's case

[10] Although the plaintiff originally challenged the operation of the quarry through representations to the local council and the planning authorities, the plaintiffs now accept the defendant has planning permission to operate the quarry and in these circumstances, they are seeking to restrain his operations so that they do not cause a nuisance. They submit that the quarrying operations constitute a nuisance due to the level of noise and dust generated by them and they further seek damages in respect of physical damage caused to their property by reason of a blast which took place on 9 November 2017.

[11] In relation to the claim for physical damage to the property the plaintiffs rely on expert evidence by Dr Cobb and Dr Leinster. In relation to the claim for noise nuisance they rely on a Certificate of Conviction and the evidence of Mr McCambley. In relation to dust nuisance the plaintiffs rely on their own evidence more particularly set out at paragraphs 13 and 14 of the Statement of Claim.

[12] The plaintiffs claim damages for physical damage caused to their property and damages for loss of amenity in respect of the dust and noise. Further, they seek an injunction to restrain the defendant in carrying quarrying operations insofar as

they constitute a nuisance and have provided a draft injunction order to the court for its approval.

The Evidence

Dr Cobb

[13] Dr Cobb is a Geotechnical Engineer and holds certificates for shot firing and blast design and has over 40 years' experience in blasting. He was instructed by the plaintiffs to prepare a report on whether a blast at Fishquarter Quarry on 9 November 2017 could have caused the damage noted at the plaintiffs' premises. Dr Cobb prepared a report dated 19 January 2019. In the report and in his evidence, he outlined that he had visited the plaintiffs' premises on 15 November 2018. He confirmed that the property was of normal cavity wall construction and all windows were double glazed. From data supplied by the geological survey of Northern Ireland he outlined that the quarry consists of Silurian rock. He explained that blasting causes ground vibrations and air blasting. Therefore, when an explosion detonates within the bore hole, stress waves are generated causing localised distortion and cracking. Outside the immediate vicinity permanent deformation does not occur. Instead, the rapidly decaying waves cause the ground to vibrate. The propagation of the ground vibration can be complex depending on the geology but generally the waves can cause damage up to 200 metres away at the most. The plaintiffs' property was approximately 40 metres from the blast.

[14] In addition to vibration, the blast produces air blasting as gases explode into the air. When this blast hits a vertical barrier, for example, a wall, it can cause it to vibrate and can cause cracking.

[15] Dr Cobb was given photographs by the plaintiffs of their premises before and after the blast. He stated that the damage he observed in the photographs was cosmetic rather than structural in nature. In his opinion the nature of the cracks was consistent with blast damage and on the basis that the plaintiffs stated their property had no damage before the blast he was satisfied the cracks were caused by the quarry blast. His conclusion was further supported by the fact he was made aware that another neighbouring property also sustained damage in or around the same time.

[16] When cross-examined it was put to him that the vibrograph which was placed approximately 30 metres from the plaintiffs' property showed a reading of 4 millimetres per second. Dr Cobb accepted that one would not normally expect damage at less than 12 millimetres per second and accepted that in over 40 years' experience he had never seen damage to a concrete block or brick building at 4 millimetres per second. He did state, however, that as the vibrograph was not in the direct line of the blast between the quarry and the plaintiffs' home and as vibration propagation is complex it remained his view that the vibration at the plaintiffs' home could have been significantly higher than 4 millimetres per second

and he remained of the view that the cracks were consistent with blast damage, especially given their location in the middle of the wall.

Dr Leinster

[17] Dr Leinster is a chartered engineer with 30 years' experience. He was instructed by the plaintiffs to carry out a structural survey of their property to investigate cracks to the property, assess them and establish the likely cause of the cracks. He inspected the property on 17 November 2017 and prepared a report dated 19 December 2017 which he adopted as his evidence. Dr Leinster stated the property was of traditional build and located close to the quarry. He itemised and photographed cracks externally on the front wall, the side wall, and the chimney. Internally he noted cracks in the entrance hall, the first-floor landing, gallery, bedrooms 1, 2, 3 and 6 together with cracks in the boiler room and garage. He stated that the cracks were cosmetic in nature and ranged from hairline cracks to cracks of 5-millimetre diameter. He opined that there were various causes for the cracks observed including shrinkage, thermal movement and blast damage. In his opinion approximately 40-50% of the cracks were due to blast damage. He reached this conclusion on the basis that the property had recently been redecorated and therefore a number of cracks he observed could not have opened up so quickly as a result of thermal movement. Further, the cracks were observed in a number of locations, for example, ceiling interfaces in the bedrooms and cracks on the front and side exterior walls which were very characteristic of blast damage and were in keeping with ground vibrations. He outlined that pressure waves from the blast lift "the roof and cause cracks with pieces of plaster breaking off." He noted dust and broken plaster on the furniture in the property which was consistent therefore with damage caused by a blast. He further stated that should blasting occur in the same manner again, it was highly likely that cracks would re-open and new cracks would appear.

[18] When he was cross-examined, and it was put to him that the reading on the vibrograph was below the figure at which one would expect damage, he opined that the vibrograph was situated behind a bank and therefore did not give a true indication of the actual vibrations at the plaintiffs' property.

Mr Mountford

[19] Mr Mountford is a partner in 365 Estate Agents. He was instructed in May 2016 to place the property on the market for sale. He attended the property in late 2015/early 2016 and carried out an inspection, took photographs and prepared a sale brochure. He recalled that the property had recently been redecorated inside and out and was not aware of any major cracks.

Aaron McCauley

[20] Mr McCauley, builder, gave evidence that he had prepared a quotation for the remediation of the defects. The quotation includes costs for scaffolding, hire of equipment, materials, storage of furniture, skip for removal of rubbish and labour costs to replaster and redecorate. The total cost was £24,780. Costs for materials and labour was £20,930 with £3850 for hire of equipment, storage etc, Mr Walsh challenged the quantum querying the need for hire of teleporter and need to power hose. The court also challenged the need for the extensive nature of the works required given that the cracks were cosmetic rather than structural in nature.

Mr McCambley

[21] Mr McCambley is employed by Ards and North Down Borough Council as an Environmental Health Officer and as the Lead in noise control. As a result of a complaint received from the plaintiffs on 23 May 2016 regarding noise at Fishquarter Quarry, he carried out an investigation using noise monitoring equipment. As a result of variations noted on 28 August 2016 and 2 September 2016, he carried out a longer term study of noise from the quarry. In his report, he noted 10 periods of one hour when noise exceeded 55 decibels, which is the level National Planning Policy Framework technical guidance states normal quarry operations should not exceed.

[22] As the result of the noise levels he approached the defendant on 10 March 2017 and wrote to him on 27 April 2017 warning him that he was minded to serve an abatement notice. On 10 March 2017 the defendant advised Mr McCambley that he was going to engage a noise consultant to reduce the noise of the quarrying operations. The defendant, however, resiled from this offer and refused to engage a noise consultant. Mr McCambley then carried out a further investigation between 11 July 2017 and 20 September 2017. He noted background noise was 38.5 decibels and explained that the decibel measure is exponential. Therefore, a reading of 10 decibels above background noise is twice as loud to the human ear. In the recording period (11 July 2017 – 20 September 2017) between 7am and 7pm, there were 20 hours when noise levels exceeded 48.5 decibels with some periods exceeding 55 decibels. When he listened to the audio recordings, he noted that the noise was caused by crushing, screening and passing lorry traffic.

[23] On 16 April 2018 he served a statutory Notice of Abatement of Nuisance on the defendant. The defendant appealed the Notice, but he subsequently withdrew his appeal and gave undertakings. Notwithstanding this the noise continued unabated. As a result, Mr McCambley conducted a further long time study between 12 and 20 November 2018. He recorded 16 hours when quarry noise exceeded 48.5 decibels and noted two periods when it exceeded 55 decibels. As a result of Mr Walsh's failure to abate the notice the council brought proceedings in the Magistrates' Court and on 20 December 2019 the defendant pleaded guilty and was

fined £7,500 and ordered to pay costs. A Certificate of Conviction to this effect was produced to the court.

Mr Drennan

[24] Mr Drennan gave evidence that he lives permanently at the property. He originally purchased a rural site on which to build his home. He and his wife then completed the building in or around 2001/2002. At that time the house was close to what they thought was a lake, but which subsequently turned out to be a disused quarry. In 2015/2016 as the children had left home and he and his wife decided to test the market regarding the value of the property. He redecorated the whole house inside and out at a cost of £4,000-£5,000. When he inspected the house, he said that it was immaculate at that stage. He then contacted Mr Mountford, estate agent, who viewed the property and put it on the market for sale.

[25] In or around May 2016 Mr Walsh started draining the lake and advised Mr Drennan he was re-opening the quarry. Some weeks later heavy machinery arrived and there was in the words of Mr Drennan "masses of dust and noise."

[26] Thereafter, there was rock breaking on a daily basis from 7am to 7pm except on Sundays. Mr Drennan said the noise came from the crusher and he said it sounded like "a stream train dragging chains." He outlined that the sound was audible within the house and made it very difficult for him to converse with others, answer the phone and/or watch television. He complained to the local council, but the noise continued unabated. He said that at times the noise was like having a constant "jackhammer" going. He accepted that the crusher did not work continuously but opined that on average it operated nine hours per week. In addition, the lorries created a lot of noise and dust as they carried out at least 10 return journeys to and from the quarry on a daily basis. He said there was constant dust which was visible on a clear day. As a result of dust he and his wife could not open the house windows or doors and they could not make use of the garden. In particular their cars were constantly covered in dust; they could not leave washing out on the line; they were unable to entertain in the garden or have BBQs; they could not play with their grandchildren in the garden as one suffered from asthma; they could not hold birthday parties outside and they could not relax outside as the patio furniture was always covered in dust and they eventually had to dump it.

[27] On the day of the quarry blast Mr Drennan recalled seeing two men outside. When he approached them, he was advised there was going to a blast in 15 minutes. He ran into the house, told his wife, and phoned the council. He was advised to photograph the house. His wife did this. He went outside and went into the quarry. He lay down to observe the blast which he said made the ground move. He then returned to his home and immediately noticed it had suffered cracks inside and out and that there was plaster on the floor.

[28] Mr Walsh cross examined Mr Drennan and suggested to him that he had exaggerated the extent of the cracking and suggested that the dust was caused by delivery vehicles going to Mr Drennan's home. Mr Drennan accepted that a number of vehicles came to his house and that they created some dust but denied, lorries frequently came to his home.

Mrs Drennan

[29] Mrs Drennan gave evidence that she works part-time and is therefore at home more often than her husband. She described noise from the quarry as horrendous especially when there was rock breaking and crushing going on. She said she could not hear herself in the house and it affected her enjoyment of her home. In relation to dust she said that she could not keep the house clean as there was constant fine dust which was much worse in the summer months. Due to the level of dust she had to replace three hoovers. On the day of the blast, she confirmed that she took photographs and gave these to Dr Leinster. After the blast occurred, she gave evidence that she had noted cracks both in the exterior of the property and also in the interior rooms and noted plaster had fallen on to the floor and on to the furniture.

Mr O'Reilly

[30] Mr O'Reilly was called by the defendant to give evidence about the cause of the cracks in the property and specifically to give his opinion about whether they were caused by the blast. Initially, there was an issue over whether Mr O'Reilly was an expert witness but, ultimately, Mr Gibson accepted that he was an expert witness.

[31] Mr O'Reilly gave evidence that the maximum peak particle velocity of the blast on 9 November 2017 was recorded on the vibrograph as 4.23 millimetres per second and the air blast was recorded as 121 decibels which lasted for a duration of half a second.

[32] On the basis of these measurements he opined that the blast did not cause any physical damage to the plaintiffs' house. He further stated that when he visited the plaintiffs' property the cracks which he observed did not look new and it was his view that they were caused by settlement and environmental factors.

[33] Later during cross-examination he accepted that as the property was built on rock there would not be much in the way of settlement cracks. He then stated that the cracks were caused by wind and storm damage.

Mr Walsh

[34] Mr Walsh was invited by the court to give evidence on 27 January 2020. At that time, he advised the court that he was not able to do so as his brother was seriously ill due to a rat bite, and he did not wish to give evidence for this reason.

[35] Subsequently, Mr Walsh instructed counsel and gave evidence to the court on 13 April 2021. In his examination-in-chief he said that he had reopened the quarry in June 2016. In respect of the dust, he stated that this arose from the fact others used the laneway and, in particular, referred to agricultural users, the fact that there were three houses on the lane and that there were frequent delivery vans attending the plaintiffs' home on a daily basis. He denied that he caused any dust and outlined to the court that he used a number of dust suppression measures, including wetting the rock. He stated he could not wet the right of way because he did not own it.

[36] In relation to noise, he accepted the conviction but advised the court that he had already constructed a "bund" to reduce noise level.

[37] He further denied that he had caused any physical damage to the plaintiffs' property and advised that in his opinion the cracks were pre-existing. He referred to a video which he had viewed on the estate agent's website, and he said that this indicated the house had pre-existing cracks, but he was unable to produce this video to the court and said that it had now been taken down from the website.

[38] Under cross examination he said he had carried out all the mitigation recommendations made by Grainger Acoustics in their report dated 3 May 2018 but stated he had no records to prove this.

My findings of fact

[39] To determine liability it is necessary to determine the following factual issues:

(i) Were cracks caused to the plaintiffs' property by the blast and, if so, to what extent was the blast responsible for the damage to the property?

[40] I find on the balance of probabilities that 45% of the cracks to the plaintiffs' property were caused by the blast. I do so for the reasons outlined below.

[41] Dr Cobb, an independent professional expert, gave evidence that the cracks in the plaintiffs' property were consistent with blast damage given their location in the middle of the wall and it was his professional opinion that the cracks were caused by blast damage. He advised that even though the reading recorded on the vibrograph would not normally give rise to cracks, his expert evidence was that, because the vibrograph was not in direct line with the plaintiffs' property and because blast vibration is complex, the vibration at the plaintiffs' property could have been significantly higher than the vibrograph reading.

[42] Dr Leinster gave supporting expert evidence that 40-50% of the cracks resulted from blast damage; the others being due to thermal movements. In his expert opinion 40-50% of the cracks bore all the characteristics of blast damage. The fact dust and plaster had fallen recently from the ceilings and walls on to the floor

and furniture in the property was characteristic of blast damage. In addition the location of some of the cracks was also consistent with blast damage.

[43] I further find the expert evidence is corroborated by a number of other factual findings. First, a neighbouring property sustained damage on the same day. Secondly, photographs of the plaintiffs' property taken shortly before the blast do not show cracks which are evident on photographs taken immediately after the blast. Thirdly, Mr Mountford estate agent, gave evidence, which I accept that photographs had been prepared for a sale brochure in May 2016 and these showed that the property had recently been redecorated and did not have the cracks which appeared on the photographs taken after the blast.

[44] I further accept that, even though the reading on the vibrograph on the day of the blast was a low vibration reading which would not normally produce damage, this reading was not indicative of the actual vibrations which would have been felt at the plaintiffs' premises because the vibrograph was placed in a location behind a bank and, therefore, it did not accurately record the actual wave vibrations felt at the plaintiffs' property.

[45] The defendant denied that the cracks had arisen because of the blast. The only expert evidence called to counter the evidence of Dr Cobb and Dr Leinster was that of Mr O'Reilly. Mr O'Reilly's conclusion was based on the vibrograph reading only and for the reasons outlined I do not consider it represents the actual vibrations at the plaintiffs' property. Initially he opined that the cracks were caused by settlement but when challenged about settlement occurring when the foundation was solid rock, he then changed his view to say the cracks were caused by wind and storm damage. I found this evidence to be less than convincing and, accordingly, I prefer the evidence of Dr Cobb and Dr Leinster.

[46] Mr Walsh further denied the cracks were caused by blast damage as he had seen a video on the estate agent's website showing pre-existing cracks in the plaintiffs' property. Mr Walsh was, however, unable to produce this video. For reasons which will appear hereafter, I consider the defendant was not a credible witness and, for this reason, I do not accept his evidence in this regard. I find it incredible that he did not produce the video given that it could easily have been obtained and shown to the court if it did, in fact, exist.

(ii) Did the quarrying operations create excessive noise?

[47] Mr Dunlop, on behalf of Mr Walsh, accepted, and I consider, that this was a proper concession that the Certificate of Conviction was evidence that there was excessive noise which constituted a nuisance for the period of time the conviction related to namely 16 April 2018 until 20 December 2019.

[48] I am satisfied on the evidence given by Mr McCambley, on behalf of the council, that the defendant showed a flagrant disregard for environmental

regulations relating to excessive noise during the period of his investigations. When he was given the opportunity to abate the noise pollution he failed to do so. When he was given another opportunity to abate the noise, although he agreed to engage an expert noise consultant he failed to do so.

[49] During the periods of monitoring by Mr McCambley, the level of noise was frequently 10 decibels above background noise level and on a few occasions the decibel reading exceeded 55 decibels. Mr and Mrs Drennan gave evidence about how the noise adversely affected their ability to enjoy their property. I accept their evidence and find that the noise level interfered with the plaintiffs' ability to converse in the property, to use the telephone, and/or to watch television and adversely affected their ability to enjoy time relaxing or socialising in their garden. Although the noise was not constant it occurred very regularly, and I find the noise nuisance represented a substantial interference with their enjoyment of their property.

[50] Mr Walsh advised the court he had built a "bund" and had taken other remedial action recommended by Grainger Acoustics to reduce noise levels and had abided by the undertakings given to the court at the interim injunction application. In these circumstances Mr Dunlop submitted that the noise nuisance was not continuing. I do not accept this submission. I am satisfied that Mr Walsh failed to take any remedial actions to reduce noise nuisance. When asked by the court, he was unable to produce any evidence that he had built a "bund" and did not produce, for example, evidence of planning permission for such. Further he did not produce any photographic evidence of the bund or a report from Grainger acoustics confirming he had built a bund or had carried out any of the remedial steps recommended in their report. In these circumstances and taking into account the fact he does not have any noise monitoring equipment his evidence that the noise levels do not exceed 55 decibels, I find is not credible.

[51] Mr and Mrs Drennan gave evidence, which I accept that the level of noise has continued unabated since the date of the conviction until the date of hearing. In total I find that they have been exposed to excessive noise for a period of four years.

(iii) Did the quarrying operations produce excessive dust?

[52] Mr Walsh, in his evidence, stated that the quarry did not produce any dust. I find this a remarkable statement given that Mr Walsh accepted that the quarry actually sold quarry dust. I do not accept Mr Walsh's evidence in relation to dust nuisance. I found Mr Walsh to be a less than open and frank witness. In particular, he gave evidence that his brother had been bitten by a rat and was seriously ill in hospital and because of his concern for his brother's well-being he was unable to give evidence. At a later court hearing he gave conflicting evidence about his brother suffering ill health due to a rat bite and did not produce any evidence to substantiate his claim that his brother had suffered ill health due to a rat bite. Further as outlined above I do not accept his evidence that he took any remedial

measures to reduce noise nuisance. I, therefore do not accept his evidence that the quarry operations do not create dust.

[53] I have preferred the evidence of Mr and Mrs Drennan, who although they were the plaintiffs in this case and obviously had an interest in the outcome, nonetheless gave measured and plausible evidence. Mr and Mrs Drennan gave evidence that dust is a constant problem especially in summer. I accept their evidence that the level of dust has substantially interfered with their enjoyment of the property and affected their ability to enjoy their garden for BBQs, family events and socialising.

[54] This evidence is corroborated by the report of MCL Consulting who concluded in their report dated February 2018 that there were a number of dust producing sources in the quarry and found evidence of dust soiling beyond the boundary site.

[55] Mr Walsh stated that dust was caused by lorries frequently calling at the plaintiffs' home. This was denied by Mr Drennan who accepted some delivery vehicles called to his home. I consider the number of vehicles calling with deliveries is small as the calls are for domestic purposes and therefore, I do not find this is a contributory cause of dust nuisance.

[56] Mr Walsh also gave evidence that he had taken remedial steps to prevent dust creation. I do not accept his evidence in this regard. First, I do not consider he is a credible witness and, secondly, he failed to produce any independent corroborating evidence to support this claim. I find he could have easily done so, by, for example he could have called MCL consulting to confirm he had carried out the dust suppression measures referred to in their report.

[57] I am therefore satisfied that excessive dust was caused by the quarrying operations and further find that Mr Walsh failed to take any remedial measures to reduce dust.

Relevant Legal Principles

[58] In *Barr v BIFFA Waste Services Ltd* [2013] QB 455 Carnwath LJ set out the relevant law in relation to nuisance at para [36] as follows:

> "36. In my view this case is governed by conventional principles of the law of nuisance, which are well-settled, and can be found in any of the leading textbooks. Thus, in Clerk & Lindsell on Torts 20th ed (2010) chapter 20, the third category of nuisance is that caused by a person 'unduly interfering with his neighbour in the comfortable and convenient enjoyment of land.' Typical examples include 'creating smells by the carrying on of an offensive

manufacture or otherwise.' Relevant to this case are the following rules:

(i) There is no absolute standard; it is a question of degree whether the interference is sufficiently serious to constitute a nuisance. That is to be decided by reference to all the circumstances of the case: (para 20-10).

(ii) There must be a real interference with the comfort or convenience of living, according to the standards of the average man (para 20-11), or in the familiar words of Knight Bruce VC:

> 'not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people' (*Walter v Selfe* (1851) 4 De G & Sm 315, at p 322).

(iii) The character of the neighbourhood area must be taken into account. Again, in familiar 19th century language, 'what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey': para 20-13, citing Thesiger LJ, *Sturges v Bridgman* (1879) 11 ChD 852, 856).

(iv) The duration of an interference is an element in assessing its actionability, but it is not a decisive factor; a temporary interference which is substantial will be an actionable nuisance: para 20-16.

(v) Statutory authority may be a defence to an action in nuisance, but only if statutory authority to commit a nuisance is express or necessarily implied. The latter will apply where a statute authorises the user of land in a way which will 'inevitably' involve a nuisance, even if every reasonable precaution is taken: para 20-87.

(vi) The public utility of the activity in question is not a defence: para 20-107.

[59] In *Lawrence and another v Fen Tigers Ltd and others* [2014] 2 All ER 622 Lord Neuberger defined nuisance at para [3] in the following way:

> "A nuisance can be defined albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or use a slightly different formulation, which unduly interferes with the claimant's enjoyment of land."

[60] In determining reasonableness the court will take into account a range of factors including the character of the neighbourhood, the intensity, frequency and duration of the interference together with relevant planning permission and statutory regime governing environmental protection.

[61] In relation to an assessment of the character of the locality Lord Neuberger said that this is a classic issue of fact and one for the judgment of the judge trying the case. In relation to the question whether the use to which the defendant actually puts his property, can or should be relied on when assessing the character of the locality, for the purposes of assessing whether the plaintiff has made out their case that those activities constitute a nuisance, the court can take into account in assessing the character of the locality the fact that it includes a quarry which is used for quarrying purposes but only to the extent that it does so in a way which does not cause a nuisance – see para [74] of *Lawrence*.

[62] Lord Neuberger also dealt with the inter-relationship of planning permission and nuisance at para [77] following in the *Lawrence* case. In particular, he posed the question whether the grant of planning permission may permit the very noise or other disturbance which is alleged by the plaintiff to constitute a nuisance, in such cases the question is the extent, if any, to which the planning permission can be relied on as a defence to the nuisance claim. In response to this question after considering various authorities he agreed with the view expressed by Carnwath LJ in *Barr v Biffa* when he said at para [46]:

> "The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should 'march with' a statutory scheme covering similar subject-matter. Short of express or implied statutory authority to commit a nuisance … there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights."

Accordingly, at para [94] he concluded:

> "I consider that the mere fact that the activity which is said to give rise to the nuisance has the benefit of planning permission is normally of no assistance to the defendant in a claim brought by a neighbour who contends that the activity causes a nuisance to her land in the form of noise or other loss of amenity."

Consideration

Has an actionable nuisance been established?

[63] In determining whether the quarry operations amount to an actionable nuisance I take into account all the factors set out above. Specifically in relation to the character of the neighbourhood I note that it is a quiet rural area where agriculture is the predominant activity but note that there is also a quarry near the plaintiffs' home. Secondly, I note that the quarry has the benefit of planning permission. The planning permission, however, is very old and unlike more recent planning permissions does not contain any environmental restrictions. In light of industry standards and in light of the expert evidence about mitigation measures which can be taken to ensure quarrying operations can be carried out without creating physical damage or excessive noise and dust I am satisfied that the planning permission for quarrying does not constitute statutory authority to commit a nuisance. Thirdly, I have found that the interference consists of excessive noise and dust which has existed for a period of four years. I have accepted the evidence of Mr and Mrs Drennan that the noise and dust prevents them watching TV, conversing, socializing or relaxing in their garden. Accordingly, I am satisfied that this constitutes a substantial interference with the plaintiffs' comfort and convenience in the use and enjoyment of their home and garden. I have further found that the blasting operation caused physical damage to the plaintiffs' home.

[64] Mr Dunlop conceded that if the court found that physical damage had been caused to the plaintiffs' home by the blast, then it was an actionable nuisance. I consider this a proper concession in all the circumstances, and accordingly, in light of my factual findings that the blast caused physical damage, this is an actionable nuisance.

[65] Mr Dunlop further accepted that the Certificate of Conviction was evidence of noise being at such a level that it constituted a nuisance. I accept this concession and find that excessive noise continued up to the date of hearing. I therefore find the level of noise generated by the quarrying operations unduly interfered with the plaintiffs' enjoyment of their land and therefore constitutes a nuisance.

[66] In light of my factual findings about dust, I am satisfied that it also constitutes an actionable nuisance because it was to a degree which unduly interfered with the plaintiffs' comfortable and convenient enjoyment of their home and garden.

[67] Accordingly, I am, satisfied there was an actionable nuisance in respect of all three claims by the plaintiffs, namely physical damage, noise and dust.

What remedies should be granted?

Assessment of Damages

Physical Damage

[68] In relation to physical damage I accept the figures in the invoice/estimate produced by Mr McCauley. Dr Leinster's evidence was that 40-50% of the cracks were due to the blast. The plaintiff and the defendant accepted that in the event the court found cracks were caused by blast damage, 45% of the cracks would be attributable to the blast.

[69] I therefore award 45% of the costs of materials and labour. I allow in full the costs of the other items including hire of equipment, scaffolding etc as these costs would have been incurred irrespective of the extent of the cracks. Accordingly, I allow 45% of £ 20,930 which equals £9418.50 plus £3,850 making a total of £13,268.50.

Loss of Amenity – Legal principles

[70] I consider that the following principles can be drawn from the existing jurisprudence:

(i) If a nuisance causes permanent or long-lasting injury to the land, this loss is likely to be compensated by an award for diminution in capital value – See *Dennis v MoD* [2003] EWHC 793. An additional award can be made for other pecuniary losses such as loss of use of the land, loss of rental income etc.

(ii) If the nuisance is transitory in nature, then the capital value of the property is seldom reduced and in such a case the owner/occupier is entitled to be compensated for the diminution in the amenity value of the property during the period the nuisance persisted – See *Hunter v Canary Wharf Ltd* [1997] AC 655, 706 per Lord Hoffman:

> "In the case of a transitory nuisance, the capital value of the property will seldom be reduced. But the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted."

(iii) The damages are for damage to the amenity value of the land rather than the loss sustained by those on the land and for this reason there is no true analogy between damages for nuisance claims and damages for pain and suffering in the personal injury context.

(iv) Nonetheless, the court will take into account the degree to which those on the land are discommoded – See *Dobson v Thames Water Utilities* [2007] EWHC 2021 at para [184].

(v) In practice this means the court, when assessing loss of amenity should consider all the circumstances and in particular take into account the following non exhaustive list of matters:

- The nature of the land – is it domestic or commercial?
- Use made of the land by the plaintiff including the amount of time spent on the land and the nature of activities carried out on the land by the plaintiff.
- The nature of the nuisance and the extent to which it has interfered with the plaintiffs' ability to use and enjoy the land.
- The duration of the nuisance.

(vi) The method by which loss of amenity is valued varies. In *Dobson v Thames Water* for example damages were assessed by reference to a loss in the notional rental value and in *Canary Wharf* Lord Hoffman at 706 obiter contemplated that the loss of notional rental value could be assessed by an estate agent valuing the difference between the right to occupy a house without the nuisance and the right to occupy one with it.

(vii) The limitations in this approach have been recognised where, for example the land is not available to be let during the period of nuisance and consequently valuation will have a considerable degree of impression. In addition, expert evidence is expensive and when the land consists of a family home, as Lord Hoffman observed, "the experience of the members of that family is likely to be the best available evidence of how amenity has been affected in practical terms, upon which the financial assessment of diminution of amenity value must depend."

(viii) In cases where assessment by reference to loss of notional rental value is either not available or practicable the jurisprudence shows a variety of ways in which the courts have assessed damages. In *Dennis* the court adopted as a rule of thumb the cost of a good holiday. When making an award of £50,000 in respect of noise nuisance caused by harrier jets over a six-year period, Buckley J commented, "The figure would barely cover the costs of a decent holiday each year which it might be thought is the least compensation that should be awarded for such a disturbance."

(ix) Traditionally the level of awards for loss of amenity have been quite low. For example, in *Barr v Biffa* the court considered damages should be in the order

of £1,000 per year for bad odours. *Wallace v MCC* [1998] WLUK 110 the court lent its imprimatur to a suggestion by counsel that a review of the authorities established an unofficial tariff of damages of £1,000 – £2,750 per annum and in *Smith v Nixon* [1995] CLY 1642 the court awarded £2,500 per annum for noise nuisance.

(x) I consider that these cases demonstrate the truism noted by Lord Lloyd in *Hunter* that damages for nuisance cannot be assessed mathematically. Therefore, when assessing damages for loss of amenity I consider the court should apply a flexible approach to ensure it does "justice" by applying the principles outlined above and by taking into account all the circumstances of the case including in particular the factors set out at para (v) above.

Conclusion on Assessment of damages for loss of amenity

[71] The plaintiffs claim damages for loss of amenity in respect of the loss of use and enjoyment of their home caused by excessive noise and dust.

[72] The plaintiffs have not provided evidence in respect of loss of notional rent. Given that this case involves the plaintiffs' home which is not a saleable or rentable asset I adopt the approach taken by Gillen J in *O'Neill v Tomlinson* [2013] NIQB 97 when he quoted with approval Stephenson LJ's comment in *Calabar Properties Ltd v Stitcher* [1984] 1WLR 287 at 293, that "it would be unacceptable to leave the real world for the complicated world of expert evidence on comparable rentals and values on the fictitious assumption that the rental value of the house has anything to do with its value to her and her family." Accordingly, I do not intend to assess damages for loss of amenity with reference to loss of notional rental value.

[73] In assessing what is essentially an intangible loss I take into account the following matters in particular:

(i) The property is the plaintiffs' home and is situate in a quiet rural area. They originally purchased a site so they could live in a quiet rural setting and enjoy all that country life had to offer.

(ii) The property consists of a substantial family home with rooms enjoying views across the countryside. It also has the benefit of a large garden.

(iii) The plaintiffs permanently reside in the property and each plaintiff spends significant periods of time in the home.

(iv) Prior to the nuisance they used their home for normal family activities such as eating meals together, watching TV, conversing, speaking with friends on telephone, entertaining family and friends and using their garden for socialising and relaxing.

(v) The nuisance I have found had a serious and detrimental impact on their use and enjoyment of their home and as a result of the nuisances they have been seriously discommoded.

(vi) The nuisance consists of both noise and dust.

(vii) The level of the interference caused by the noise and dust was very significant. The noise level was very high and was of a continuous rather than an intermittent nature, occurring for several hours each weekday and also at weekends. At certain times the noise level was significantly higher due to rock breaking which occurred several hours each week. The dust nuisance was also constant but worse in summer.

(viii) The nuisances continued unabated for a period of four years.

[74] In light of my findings of fact set out above and having regard to the serious interference in the plaintiffs' use and enjoyment of their home for a period of four years I consider that the appropriate figure for loss of amenity is £50,000.

Injunctive relief – Are the plaintiffs entitled to injunctive relief?

[75] The defendant submits that an injunction is not required as the injury to the property only occurred on one occasion and there is no risk of repetition as he requires planning permission for another blast, and such would only be granted on strict conditions. He further submits that there is no ongoing noise or dust nuisance and therefore injunctive relief is unnecessary.

[76] The general rule is that where the plaintiff establishes a breach of a common law right and there is ground for believing that without an injunction there is likely to be a reputation of the wrong, he is, in the absence of special circumstances, entitled to an injunction. Snells Equity (32nd edn) para 18-028 states:

> "The relevance of past interference. In cases where the defendant has already infringed the claimant's rights, it will normally be appropriate to infer that the infringement will continue unless restrained: a defendant will not avoid an injunction merely by denying any intention of repeating wrongful acts… there are limited circumstances in which an injunction will be refused on the ground that it is unnecessary…."

[77] In the present case, given Mr Walsh's flagrant disregard for the regulatory regime and his lack of credibility in respect of putting in place remediation measures I am satisfied that there is a very real risk of future noise and dust nuisance. This is especially so in circumstances where the defendant can operate his quarry without restrictions as the existing planning permission, unlike more recent planning

permissions for quarry use, does not contain conditions in relation to environmental matters. I therefore consider that an injunction is necessary.

[78] I consider that Mr Walsh should be permitted to continue to engage in quarry operations especially as he has planning permission to do so. He can only do so, however, insofar as he does not create a nuisance.

[79] I therefore intend to grant an injunction on terms which restrain the defendant from causing noise and dust nuisance. I have had the benefit of the expert report of Martin Grainger of Grainger Acoustics. In his report dated 3 May 2018, which was provided at the hearing of the interim injunction, he noted the sources of noise in quarrying operations and set out mitigation measures which could be put in place to reduce noise levels. These include:

> "(i) Moving the cone crusher permanently to the furthest point in the quarry from the plaintiff's home and building a rock mound of 8 metres between the cone crusher and the plaintiffs'' home.
>
> (ii) Purchasing quieter plant and equipment.
>
> (iii) Limiting hours of operation to normal working hours and not permitting operations in early morning or late evening.
>
> (iv) Ensuring all plant and equipment is well maintained especially with regard to exhausts.
>
> (v) Placing engine covers on all plant and equipment.
>
> (vi) Fitting suitable noise mitigation devices on all equipment.
>
> (vii) Ensuring reversing beepers are "pink noise" subject to health and safety requirements.
>
> (viii) Replacing the weighbridge generator with a more modern version."

[80] He further observed that planning authorities usually restrict noise level for quarrying operations to 55 decibels. I consider that such a condition is necessary to prevent future noise nuisance. I accept however that on occasions, the noise level of certain quarrying operations will of necessity be above 55 decibels and therefore the injunction should reflect this by means of a condition stating, "Sound levels not to exceed 55 dB LA eq during normal working hours defined as 7am-7pm. Increased temporary noise limits of up to 70dB are permitted for up to eight weeks per year to

facilitate short term works. Such works to be notified to the plaintiff 28 days in advance."

[81] In relation to dust the court had the benefit of an expert report provided by MCL Consulting dated February 2018. It helpfully set out the dust generating sources within the quarry and then set out what dust suppression measures could be put in place. The dust mitigation measures include:

> "(a) Wetting of internal roads, exposed bedrock areas and stockpiles using a water bowser three times per day;
>
> (b) Wetting of external haul routes from the site entrance along the gravel laneway up to Coulter's Hill road junction;
>
> (c) Wetting of stock prior to movement by means of water spraying from bowsers;
>
> (d) Wetting of stock within the crushing hoppers and wetting of aggregates during the screening stages, and
>
> (e) Wetting of active faces or extraction areas by means of spraying from the bowser."

[82] I consider that the injunction should contain all these conditions, save (b), as these are necessary to stop future dust nuisance. I note that the laneway/road is not owned by the defendant, and he only has a right of way over it and therefore I do not require him to carry out any works over it.

[83] To prevent future physical damage to the property by reason of quarrying operations I consider that the injunction should contain a condition that the defendant is to give seven days' notice to the plaintiffs in respect of any proposed blasting operations.

[84] I invite the parties to lodge an agreed draft order of injunction within seven days of the date hereof and in absence of agreement the court will make an order.

[85] The court therefore makes an award of £63,268.50 damages in favour of the plaintiffs. The court will hear submissions in respect of costs and interest.