

**IN THE SUPREME COURT  
THE TURKS AND CAICOS ISLANDS**

**NO: CL 84 of 2004**

**BETWEEN:-**

**COLIN BROOKER (TRADING AS ISLAND HOUSE)  
APPELLANT**

**-AND-**

**ERVINE QUELCH  
RESPONDENT**

MR BROOKER                      appeared for THE APPELLANT

MR ARIEL MISICK (QC)        appeared for THE RESPONDENT

**JUDGMENT**

1. This appeal comes before me in my capacity as Acting Judge of the Supreme Court following my appointment on 31st March 2005, which was gazette on April 8<sup>th</sup> 2005. This matter was allocated to me and my appointment confirmed to here this specific matter by the Chief Justice on 11<sup>th</sup> April 2005.

2. Mr Brooke Trading as Island House, is the appellant and Mr Brooker appears in person. Mr Barnett having filed notice to come off the record yesterday afternoon pursuant to Order 67. r 1 . Mr Ariel Misick QC appears for the respondent. The appellant owns a hotel which is located next to a property which is being built by the Respondent.

3. The matter before me is an appeal to be heard in Chambers, pursuant to Order 58, by Mr Brooker (Trading as Island House) against a judgment made by Registrar Holder-Alert on 8<sup>th</sup> April 2005. This decision of the Learned Registrar is evidenced in a signed order of that date and by a written ruling. I am satisfied that the requisite service and notice provision of Order 58 have been met and neither party has taken issue. This matter as set out in para 58/1/3 white Book is to be dealt with by way of an actual rehearing of the application which led to the order under appeal, and I should treat the matter as though it comes before me for the first time. I am of course entitled to give the weight to any decision made by a person, who has jurisdiction to make such an order, that it deserves but I am not bound by it (Lord **Atkins Evans v Bartlam (1937) AC 473 at 47**). I am entitled also to of course admit further or additional evidence by affidavit to that which was before The Registrar. An affidavit has been filed very late in the day by the Appellant n this matter which is regrettable.

4. The main proceedings CL 84/04, were issued on the 2<sup>nd</sup> December 2004. A detailed statement of claim sets out the basis for a claim in tort for nuisance and negligence. To very briefly summarise the complaint concerns an allegation that there was excessive noise in particular in the nighttime hours emanating from the construction work on the Respondent's prop which was disturbing the Appellant, his guests and therefore his business. I have considered the same.

5. These proceedings had an unusual birth as they commenced with an ex parte emergency application for an interlocutory prohibitive injunction being made to Acting Chief Justice Martin in the early hours of the morning of 2<sup>nd</sup> December 2005. An order was made at 0025 hours upon hearing the plaintiff in person and reading an affidavit sworn by the Plaintiff of the same date. That order was quite correctly made on condition that what is commonly termed as being the normal undertaking as to damages be given. There was also an undertaking to issue proceedings improper form no later than 4pm on 2<sup>nd</sup> December 2004. It was ordered that;

- a) *The def shall immediately cease its construction work on the site adjoining Island House, Grand Turk*

- b) *The def is forbidden to create noise such as to disturb the sleep of the persons occupying Island House, Grand Turk.*
- c) *The order was to remain in force until; 9am on Thursday 2<sup>nd</sup> December when it was to be reconsidered. The Learned Acting Judge clearly being concerned that the rep should be able to challenge the order, if he wished, at the earliest possible opportunity.*

I note with interest that the order also contained the penal notice as required for enforcement under Order 45 R 7(4) appears on the face of that order.

6. It appears that the Respondent was served with a copy of the injunction at approximately 7am on 9<sup>th</sup> December. The appellant appeared before the Judge Martin at 9.30am with Mr Barnett of Counsel and the Respondent appeared on such short notice in person. It is contended by the Appellant that this was a return date hearing. What is clear is that it was on extremely short notice and that the Respondent has not opportunity to seek representation or file and affidavit in reply. With hindsight it is regrettable that the learned judge did not extend the injunction of for a further short period of time and set a return date a few days later. The Resp was unrep and was probably unaware of this type of opportunity. It is clear (**note 291A/25 white book**) as contended by the Appellant that when a plaintiff moves ex parte and the defendant is present and address the Ct that the hearing is inter partes and any appeal therefore is an appeal against an inter partes order. However, where an injunction was obtained ex parte with notice, and was opposed by the enjoined party but no evidence was filed on his behalf it is unsatisfactory for that party to pursue an appeal at that stage. Instead the Plaintiff's original motion should be stood over to a subsequent inter-partes hearing when the evidence of both sides will be before the court of first instance (**Hunter & Partners v Wellings & partners (1987) FSR 83 at 88 CA per May LJ**). Having regard to the extremely short notice of this matter I find that the hearing was not strictly a return date but an ex-parte hearing on notice often called an opposed ex-parte hearing. I feel that the Court was fortunate that the Resp was actually able to attend at ct on that date at such short notice.

7. At this ex-parte hearing on notice a further order was made The order stated;

- a) *the defendant shall not operate his construction work on the site adjoining island house, Grand Turk between the hours of 7pm and 6.30 am*
- b) *the defendant is forbidden to create excessive noise such as to disturb the comfort of the persons occupying Island House, Grand Turk at anytime.*
- c) *This action be adjourned generally with liberty to restore*
- d) *costs were reserved*

I note with great interest that no penal notice appear to have been attached to that order. I also note that no formal undertaking was given on this occasion. However, it may be argued that the undertaking need not be given expressly as it is implicit in the application (**Coledge v Crossley (1975) The Times 18 March**). In that matter the Plaintiff obtained an interlocutory injunction but then discontinued the action; the defendant was still entitled to enforce the usual undertaking as to damages. I have not seen a full transcript of

this case. However, despite this matter I feel that it is still good practice for clarity sake, that undertaking to be included in the face of the order and this should still be encouraged.

8. An application is then made by the Resp through his attorney on 2<sup>nd</sup> march, to discharge paragraph 3 of the said order and to vary pares 1 and 2 to read;  
*“ the defendant shall not until trial or further order in the meantime, carry on construction work on or from his property at parcel 10104/102 so as to unreasonable interfere with the comfort and enjoyment by the Plaintiff and his guests on the property comprised in parcel 10104/61.”* That hearing which was due to take place on the 7<sup>th</sup> March due to counsel convenience did not take place until 6<sup>th</sup> April 2004.

9. Regrettably this is where this straightforward matter began to get confused. The matter was listed to come before Acting Judge Dawn Holder Alert. I have seen nothing that indicates that The learned registrar had been so appointed to enable her to hear this matter. I have seen notes of evidence recorded by the registrar on that date but no copy of an order setting out in which capacity she was then sitting.

10. It appear that when the matter eventually came before the Ct that the resp was of the belief that the registrar was sitting in the capacity of acting judge. This is evidenced by the draft order that was submitted by them referred to her as the same at two places in the order. It appears that the learned registrar had not been so appointed and it is clear that she shared that view because the final order that she signed clearly set out that she was acting as the Registrar.

11. On hearing the matter the learned registrar made an order varying the injunction order made by the Acting Judge Martin on 2<sup>nd</sup> December 2004. I note that no that no penal notice was attached to the face of the order. I will comment no further on that today. The order was varied to include the phrase “ upon the plaintiff giving the usual undertaking as to damages. I have to say that I am not content with an undertaking being phrased in such a vague manner. An undertaking may be enforced and as in all such matters such vagueness is not to be encouraged .The undertaking should of course follow the wording so appropriately used by Acting Judge Martin, namely, “ undertaking to pay any damages ordered by the Court if it later decides that the defendant has suffered loss as a result of this order which the plaintiff ought to pay. ‘

12. *The order was further varied saying, The body of the order reads. “ The defendant is forbidden to create any excessive noise or to carry out construction work with equipment which creates excessive noise as to disturb the comfort of the persons occupying Island House, Grand Turk until trial or further order.”* This is again regrettable wording as it does not make patently clear on the face of the order whether this is in addition to or replaces para 1 and 2 of the order of December 2<sup>nd</sup> 2005. It is fundamental that injunction orders and variations to the same are specific or else

enforcement proceedings can become a guessing game. Thankfully the learned Registrar's very helpful ruling clarifies the position, and it is clear that the old para 1 and 2 are to be excluded from the new order.

13. a primary consideration is whether the Registrar had the jurisdiction to vary such an order made by a judge of the Supreme Court. Order 32 R11 sets out the jurisdiction of the registrar to hear matters in Chambers.

The registrar shall have power to transact such business and exercise all such authority and jurisdiction as under the Ordinance or these rules may be transacted and exercise by a judge in chambers except in respect of the following matters and proceedings, that is to say,

(d) subject to para(2), Order 51 and Order 77, rule 16 , proceedings for the grant of an injunction or for the appointment of a receiver.

The hearing of the 6th April 2005 amount to the granting of an injunction and are not related to Order 51 or order 77. Therefore it appears that the Registrar had no jurisdiction to make such an order.

14. I must therefore set aside her order and this means that the order of 2<sup>nd</sup> December remains in force. However as this is an appeal I may consider the matter afresh. If the appellant fails to turn up I have the power to reconsider the matter.

15. I have reconsidered the matter and I find that the basis of the Registrar's order was sound and see no reason why I should seek to vary the intention of that order. However, the order needs fine-tuning and the order I make will be.....

NB: IF VARY ORDER THEN NO UNDERTAKING GIVEN

SHOULD DISMISS ORDER – NO INJUNCTION