IN THE HIGH COURT OF THE COOK ISLANDS

HELD AT RAROTONGA

(CIVIL DIVISION)

MISC. 34/2002
PLAINT NO. 15/2002

BETWEEN **BRET PORTER** of Rarotonga Businessman

Plaintiff

AND **HENRY ARIIHEE** of Rarotonga, Rock Crusher

Defendant

Mr Bracefield for Plaintiff

Mr Arnold for Defendant

Date: 26 June 2002

DECISION OF GREIG CJ

This is an application for an interim Injunction to stop the Defendant operating his rock crushing plant on grounds as the Plaintiff has alleged in his Statement of Claim that the noise emanating from the Defendant's rock crushing machinery is of great discomfort to the Plaintiff and interferes with the Plaintiff's quiet use and enjoyment of the Plaintiff's property.

The Plaintiff occupies a residential property and has lived there for some 24 years. He uses the property as well as for residential purposes for his office although he has office premises in Avarua as well. Using a home for office activities is now a much more common thing than it used to be. It is certainly a perfectly reasonable and legitimate use of your residence.

The Defendant owns his land on which this rock crusher is operating. It is owned by him as native land. Some two years ago in April 2000 he set up

the plant and commenced the operations. It is some 200 metres away from the Plaintiff's property. I have not had a view of the area as I thought it was inappropriate at this stage, it maybe appropriate at a later stage if this matter proceeds to a substantive trial. I have been assisted however in this case and in the consideration of it by a series of photographs which the Defendant has produced taken from the rock crusher, showing the surrounding area. It is clearly a rural or agricultural area. There is some residential properties visible or hidden in the bush and foliage, there appears to be no other industrial usage visible in the vicinity. The area is of considerable distance from the main road and although I have not had any evidence about this it appears that it could be described as a pleasant rural area, some distance from the buzz of activity on the main road and with pleasant views to the sea.

When the operation commenced there was objection about noise and about dust. That came not only from the Plaintiff but from others who are in closer proximity to the plant. The Defendant has taken steps to reduce if not to eliminate the dust. He has also taken steps to reduce the noise but as is almost inevitable with an activity of this sort, that is, a considerable amount of noise which continues during the rock crushing operation. The noise from time to time is increased by the loading of a hopper of larger rocks which involves the use of a diesel engine front end loader and the crash of the rocks into the metal steel hopper. The Defendant operates between 8.30 in the morning and 5 at night, 5 days a week. He has also operated on Saturdays, this was a particular complaint of the Plaintiff. It seems however that in recent months there has been only occasional Saturday operation. In the course of the hearing the Defendant offered to undertake not to operate at all on Saturdays at least pending the final resolution of this matter. This at least indicates to my mind that the Defendant is not deliberately out to make a noise and is taking such steps as he can at the moment to ameliorate the inevitable that comes from his operations.

3.

When it comes to noise nuisance there is considerable difficulty in making a decision about it. This is partly of course because annoyance from noise is a peculiarly subjective matter, some people are particularly prone to noise nuisance, they have particular sensibilities about it, there are in any event some particular noises and noise levels which can create more annoyance than others. Again a noise which continues for the operating daylight hours can become more annoying as it continues and as the sensibility of the hearer becomes more irritated. The only case that I was referred to in this hearing was *Halsey v Esso Petroleum Co. Ltd* [1961] 2 All E R 145, a decision, at first instance which included an element of noise. His Lordship in his decision in that case at page 156 in declaring the standard said this: "applying and adapting the well known words of Knight Bruce, V C; in *Walter v Selfe*, this inconvenience is, as I find to be the fact, more than fanciful, more than one of mere delicacy or fastidiousness. It is an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes of living, but according to the plain and sober and simple notions among ordinary people living in this part of Fulham."

That I think can be applied to this part of Rarotonga. The kind of neighborhood is an important consideration to bear in mind. As I have said it is not just the sensibility of the Plaintiff that is in issue, but the sensibility of ordinary people living in this particular area being subjected to the noise.

In the *Esso* case there were scientific tests which seemed to indicate a noise level peaking at about 68 decibels with tests showing what was in effect and was held to be a constant loud noise outside the Plaintiff's house. In that case there was no objection to the noise during the day but only at night where the Defendant's petrol operation continued throughout the night disturbing the sleep and quiet enjoyment of the Plaintiff and others.

4.

In this case the Plaintiff is supported by the evidence of another person living within the same approximate distance from the plant. On the other hand the Defendant has produced at this stage evidence by way of affidavit from persons who live considerably closer to the plant and who do not object to it, perhaps because as one of them has indicated they have got used to the noise.

This is a case for an Interim Injunction, not a final injunction. The standard approach is whether there is an arguable case and then whether on the balance of convenience and in the general discretion of the Court the injunction should be granted.

I think clearly there is on the Plaintiff's part a genuine annoyance arising from levels of sound which although described in his affidavit and in an Exhibit to it as reaching the level of moderate annoyance still gives rise to an arguable case. On that aspect then the Plaintiff succeeds.

Turning then to the balance of convenience, as I have said this operation began in April 2000. This proceeding was commenced in May 2002, some two years afterwards. There has been some objection and correspondence as between the parties and advisors in the interim but it does seem that the Plaintiff has not acted as expeditiously as might be expected if this noise is of such a degree as it claimed. There is no suggestion that the noise levels are detrimental to health. And in any event, the noise is only during the day and on the undertaking of the Defendant only during the five days of the working week. As I have said the scientific figures reach the level of moderate annoyance that is outdoors. The level of actual noise indoors is not available nor is there any real evidence as yet of the noise levels for any continuous period of hours. The Defendant has come to this area and introduced the noise. He is using his own land. There is no zoning provision in Rarotonga;

there is noise control legislation but that is a matter of prosecution rather than action for private nuisance.

What happens as I am aware from my visits here is that industry of various kinds, operations of various kinds spring up and are continued here there and everywhere. But of course the Defendant and any operator of any business must comply with the law and not commit a nuisance.

This is the Defendant's livelihood. His plant is set up and has now been going for some time. If an Interim Injunction is granted his livelihood at this point would stop and it may be in the nature of things some time before there could be a substantive hearing.

On balance therefore I think that the convenience is in favour of the Defendant and that in the exercise of the Court's discretion there should be no grant of an Interim Injunction. That of course does not decide the matter, it will be open to the Plaintiff to continue this action and to seek a permanent injunction in a substantive hearing.

The application now made is therefore refused. In the circumstances I will reserve costs to await the further outcome or resolution of this matter.

CHIEF JUSTICE